

Missouri Attorney General's Opinions - 1946

Opinion	Date	Topic	Summary
1-46	Feb 28	COUNTY COURT.	County court has power to sell county land and in the absence of specific statutory direction as to the procedure of the sale, only reasonable precautions must be taken.
1-46	July 10	SHERIFFS IN COUNTIES OF THE THIRD CLASS.	Shall collect all fees, both criminal and civil, and shall collect the amount as provided by existing fee statutes; the sheriff and county court may not enter into an agreement to pay the sheriff a flat 5¢ a mile for his mileage; sheriff shall bill the county court at the end of each month for feeding prisoners and for mileage.
1-46	Sept 12	INDEMNITY. DISEASED ANIMALS.	Purchaser of tubercular steer, which was purchased for butchering, is not entitled to indemnity even though the carcass was destroyed on order of State Veterinarian as unfit for consumption by human beings.
1-46	Dec 16	DEPT. OF AGRICULTURE – AGRICULTURAL & VEGETABLE SEEDS.	Neither agricultural nor vegetable seeds may be sold or offered for sale in the State of Mo. under Sec. 14271, Art. 16, Chap. 102, R.S. Mo. 1939, nor may rules or regulations be adopted under Sec. 14272, unless such seeds are free from seeds of Canada thistle, Johnson grass, and field Bindweed (<i>convulvulus arvensis</i>).
2-46	Dec 11	MAGISTRATES. PROSECUTING ATTORNEYS. COUNTY COURTS.	Judge of probate court in counties of less than 30,000 inhabitants is ex officio judge of magistrate court. Additional clerks, deputy clerks and employees may be provided for magistrate court by county court, where necessity exists, their salaries to be paid by county. Stenographic services for probate judge are paid for by the county out of Class 4 as provided in Budget Act. Clerk of magistrate court may receive pay for stenographic work done for probate judge. Clerk of magistrate court may act a stenographer for probate judge, and will be paid for such services in addition to his salary as clerk of magistrate court. Stenographic services for prosecuting attorney may be paid for by county out of Class 4 as provided in Budget Act.
3-46	Oct 4	CIRCUIT JUDGES. CONSTITUTIONAL LAW.	The General Assembly has the power to increase the salary of circuit judges during their term of office.
3-46	Nov 22	APPROPRIATIONS.	Applicability of House Bill No. 837 of the 63rd General Assembly to expenditures made by Central Missouri State College.
5-46	Aug 9	TAXATION AND REVENUE.	Definition of term “other political subdivision” as used in subsection 10, Section 39, Article III, Constitution of 1945.
6-46	Jan 4	NEWSPAPER.	Entitled to be reinstated under Section 14968, page 859, Laws of

			Missouri, 1943, by the fulfillment of the requirement of the statute. Publisher defined.
6-46	Jan 15	PRIMARY CANDIDATES. SECRETARY OF STATE.	(1) Notice of primary candidates to be given by Secretary of State by April 8, 1946. (2) Last filing date for candidates for August 1946 primary is April 30, 1946.
6-46	Mar 18	ELECTIONS.	Declaration of candidacy for nomination as circuit judge of a judicial district composed of but one county should, under Section 11553, R. S. Mo. 1939, be filed with Secretary of State.
6-46	Apr 20	OFFICERS. MAGISTRATES.	Office of magistrate is constitutional office and persons aspiring to such office should file declarations with county clerk.
6-46	Apr 23	CONSTITUTIONAL LAW. PROBATE JUDGES. MAGISTRATES.	Sections 18 and 25, Constitution of 1945; Senate Bill 207. In counties of 30,000 or less, persons seeking office of probate judge and magistrate must qualify for probate judge. There is no conflict as to qualifications for magistrates by the Constitution and Senate Bill 207.
6-46	July 19	ELECTIONS.	Name of candidate should not be printed on official ballots when such candidate dies before primary election.
6-46	Nov 27	ELECTIONS.	Secretary of State in canvassing of votes for members of congress, state senators and representatives and judges of the circuit courts does not follow procedure laid down in Section 18, Article IV of the Constitution of Missouri.
7-46	July 10	COUNTY BUDGET LAW.	Appropriation for county hospitals comes out of class five of Budget Law.
7-46	Oct 29	CITIES. SALES TAX. FRANCHISE.	Sales tax should be collected on sales of electrical current and water by a municipally owned light and water plant. In Re: Franchises of telephone and other public utility companies.
10-46	Aug 26	COUNTY COURTS.	Use of seal, and fee of Sheriff and deputy for attending such court.
10-46	Sept 3	CONSERVATION COMMISSION. WATERS.	The State of Missouri owns beds of navigable waters, and the riparian only owns to low water mark of navigable waters.
10-46	Sept 16	CONSTITUTIONAL LAW. OFFICERS. SHERIFF.	Section 4, Article IV, Constitution of 1945 does not permit the Governor to fill vacancy in office of sheriff. Such vacancy filled by County Court.
10-46	Oct 24	COUNTY COURTS.	Use of seal. Supplement to Opinion No. 10 dated 8/26/46.
10-46	Nov 8	STATE BOARD OF OPTOMETRY.	Without authority to limit the statutory qualification-period of registered apprentice to five years by regulation.
11-46	Feb 8	TAXATION.	Section 13763, R. S. Mo. 1939 is a complete scheme providing for the

		COUNTY COURTS. ROADS.	levying and expenditures of funds for particular road purposes.
11-46	July 1	ELECTIONS. PRIMARIES.	Who entitled to be considered candidates; what is a proper declaration of candidacy.
11-46	July 9	MISSOURI STATE SANATORIUM.	Senate Bill No. 129, 63rd General Assembly applies to Sanatorium.
11-46	Oct 1	SCHOOLS. COUNTY AND TOWNSHIP FUNDS.	Procedure for election and distribution of county and township school funds.
12-46	Jan 21	INSANE PERSONS.	Probate Court has authority under Section 605, R. S. Mo. 1939, to commit a veteran to an institution outside the State of Missouri.
12-46	July 22	SHERIFFS. CONSTITUTIONAL LAW.	The sheriff of Greene County and his deputies are paid according to the provision of House Bill No. 939 after July 1, 1946.
12-46	July 30	SCHOOLS.	(1) Upon filing of petition for consolidation with county superintendent of schools, or filing of petition for annexation with school board of a common school district, jurisdiction attaches when the petition is filed. (2) In the formation of a consolidated school district the superintendent, in laying out the boundary lines of the proposed consolidated district, cannot include in such district part of a previously organized consolidated district.
12-46	Aug 20	CIRCUIT COURTS AND SALARIES.	Circuit Judge of the 26th Judicial Circuit not entitled to change of venue fee provided in Sec. 1074, R. S. Mo. 1939.
12-46	Aug 29	COUNTY OFFICERS. CIRCUIT CLERK.	The Circuit Clerk of Greene County is not entitled to receive \$1200 compensation for serving as clerk of the board of paroles of that judicial circuit.
13-46	Jan 12	TAXATION AND REVENUE.	Duties of County Collector with respect to acceptance of tender of payment upon separable items of property.
13-46	Mar 27	COUNTY COURTS. PROSECUTING ATTORNEYS.	County Court not authorized to employ special counsel, with certain exceptions.
13-46	Mar 28	PAROLE.	An alleged parole violator may be held for re-arrest for a reasonable time.
13-46	May 16	Hon. Edmund Burke	WITHDRAWN
13-46	May 17	LIQUOR.	a) Definition of "managing officer" of a corporation in licensing statute. b) A foreign corporation with resident "managing officer" of good moral character may be issued any kind of license. A foreign

			corporation with no resident “managing officer” may be issued a solicitor’s license only.
13-46	May 23	ELECTIONS. BOND ISSUES.	The City of Excelsior Springs must hold a primary election before holding a special election to fill a vacancy in the city council. The city may vote on the proposition of issuing revenue bonds to acquire a municipally owned light plant at the same time that the special election is held to fill the vacancy in the city council.
13-46	July 11	Hon. L. Madison Bywaters	WITHDRAWN
13-46	July 12	BOARD OF PROBATION AND PAROLE.	Do not have authority to revoke a parole or conditional commutation, or to rescind the revocation thereof, signed by the Governor prior to July 1, 1946; shall pay expense of returning inmate upon revocation of parole or conditional commutation; has no authority to make rules regarding final discharge from parole and only Governor can grant commutation.
13-46	Aug 12	TAXATION. COUNTY COURT.	Power of county court to correct erroneous assessments of real estate under Sections 23 and 24 of HCSHB 469.
13-46	Dec 19	OFFICERS.	One person may not hold the office of recorder of deeds and city collector at the same time, nor may one person hold the office of magistrate and police judge of a city at the same time.
15-46	Aug 17	DEPARTMENT OF PUBLIC HEALTH AND WELFARE.	Appeals under Sec. 9411 R. S. Mo. 1939, shall be made to the Director of Public Health and Welfare under Senate Bill No. 349.
15-46	Nov 18	LABOR DEPARTMENT.	Division of Employment Security may submit their plan of operation for the Missouri State Employment Service to the Secretary of Labor of the United States.
16-46	Feb 14	COUNTY COURTS.	Right to purchase lands sold under school fund mortgages.
16-46	June 21	MOTOR VEHICLES.	Operating vehicle in Missouri registered under the Dealer’s and Manufacturer’s Law of Kansas; necessity of chauffeur’s license of person operating such vehicle.
16-46	Oct 28	LIQUOR CONTROL.	(1) 3.2% nonintoxicating beer may not be sold to minors; (2) 3.2% nonintoxicating beer may be sold on Sunday but Sec. 4742, R. S. 1939, may be invoked against the act of selling same.
17-46	July 30	SHERIFF. COUNTY COURT.	Sheriff cannot enter into agreement with county court whereby the sheriff’s family would be furnished their groceries as reimbursement for feeding prisoners.
18-46	Apr 19	ELECTIONS.	Declarations of candidacy may be filed with county clerk by mail or by a person other than the candidate himself. Receipt of payment to

			county central committee should be filed therewith.
18-46	May 23	CONSTITUTION. ROADS AND BRIDGES.	Five questions regarding issuance of warrants in anticipation of revenue under Article X, Section 12(a), Constitution of 1945; setting up of the budget of counties in same respect; classification of expenditures under Sections 10911 and 10914, Laws of Mo., 1941; not necessary to revise budget after July 1, 1946.
18-46	June 11	ELEEMOSYNARY INSTITUTIONS.	The Board of Managers of the Missouri School for the Blind may provide additional facilities to be paid out of a fund that does not contain an appropriation from the State of Missouri.
18-46	July 13	ELECTIONS. CONSTITUTIONAL LAW. OFFICERS. ASSESSOR.	The assessor of St. Francois County who was appointed to fill the vacancy in the office does not hold office for the entire term but only until the beginning of the term after the next general election.
18-46	Aug 28	TAXATION AND REVENUE.	Five questions relative to procedure to be had under H.C.S.H.B. 868 of the 63rd General Assembly, relating to taxation of intangible personal property.
18-46	Dec 10	ASSESSORS. CONSTITUTIONAL LAW.	House Bills 891 and 890, which raise the fees of assessors of third and fourth class counties, are not in violation of Sec. 13, Art. VII, Const. of Mo. 1945, which prohibits the increasing of compensation of county officers during their terms.
19-46	Nov 14	TAX LEVY.	An increase in the levy above the constitutional and statutory limit of taxes for public health purposes would be unconstitutional, when such levy is ordered by the circuit court.
20-46	Jan 23	SCHOOLS. SERVICEMEN.	(1) University of Missouri may charge Veterans Administration non-resident tuition fees for resident veterans; (2) Lincoln University may charge Veterans Administration non-resident tuition fees for resident veterans; (3) State Teachers Colleges may charge Veterans Administration non-resident tuition fees for resident veterans.
20-46	Apr 25	W. J. Cremer	WITHDRAWN
20-46	May 24	SHERIFFS.	Reports required to be made in third class counties.
20-46	July 23	SCHOOLS. COUNTY COURTS.	The county court must pay clerical help of the superintendent of schools in Mississippi County within the limits prescribed in HCSHB No. 770.
20-46	Sept 11	QUARANTINE.	State Veterinarian, under Sec. 14195, R.S. 1939, may quarantine chickens infected with Newcastle disease. The Governor, under Sec. 14207, may issue proclamation quarantining areas in which Newcastle disease is widely disseminated or epidemic. State Veterinarian, or his

			deputy, may quarantine chickens infected with or which have been exposed to infection by Newcastle disease when offered for sale at a community sale. No authority exists for any state officer to order destruction of chickens.
20-46	Sept 23	TAXATION AND REVENUE.	Liability for filing return of intangible personal property by resident beneficiary of trust estate.
20-46	Oct 4	AUTOMOBILES. LICENSES.	The members of a partnership may operate cars owned by them without taking out a registered operator's license.
20-46	Oct 14	SURVEYORS COUNTY. COUNTY SURVEYORS.	County surveyor must sign 'record of surveys' and same cannot be signed by deputy or third persons.
20-46	Oct 29	PROBATE CLERK.	In counties wherein probate judge and magistrate judge are one, the probate and magistrate clerk may practice law in all courts except the probate and magistrate court.
20-46	Nov 14	COMMON SCHOOLS.	Directors of common school districts can employ attorneys to defend mandamus action if they are acting in good faith.
20-46	Dec 19	BOARD OF ACCOUNTANCY.	Paragraph (c) Section 14911f, Laws of Missouri, 1943, prescribes alternative qualifications for individuals who apply for certificates as certified public accountants.
21-46	Feb 18	COUNTIES.	County Court cannot make donation to city for municipal airport.
21-46	Mar 8	ROAD DISTRICTS.	Surplus monies in a Road District's Sinking Fund cannot be transferred to other funds for other purposes until the principal indebtedness and the interest thereon, has been extinguished.
21-46	Sept 14	SHERIFF'S FEES.	Fees earned by sheriff before July 1, 1946 that do not exceed the statutory limitation of \$5,000 for a period of one year may be retained by him.
22-46	Jan 29	AIRPORTS.	The legislative body of a political subdivision which has established an airport may establish a board or body to administer the same.
22-46	Apr 26	MUNICIPAL CORPORATIONS.	Discussion of rights of foreign municipal corporations to acquire real property for airport purposes in Missouri and incidental matters relative thereto.
22-46	July 1	COUNTY PLANNING AND ZONING.	Authority of Missouri State Department of Resources and Development relative to master plans adopted by counties of the first class.
22-46	Dec 9	MEMORIAL AIRPORTS.	One municipality only may establish a memorial airport under House Bill #192. Two or more municipalities cannot combine for such purpose. An appraisement or valuation of real estate previously acquired cannot be used by a municipality as a basis for appropriated funds for matching the \$10,000 State aid. The Governor and the

			Missouri State Division of Resources and Development would have the right to follow matching State funds for memorial airports to see that they are lawfully expended.
22-46	Dec 16	ASSESSORS.	Receive an annual compensation from June 1st of one year to May 31st of the next year.
23-46	Feb 8	STATE TEACHERS COLLEGES. CONSTITUTIONAL LAWS.	The Central Missouri State Teachers College is unauthorized to accept money from the Federal Government under Title V, Public Law 458, 78th Congress. The acceptance of such money would be a contract without express authority of law in contravention of Section 39 (4), Art. III, Const. 1945.
23-46	July 6	SALARIES. FEES.	City of St. Louis is entitled to all fees and mileage paid by State Auditor for transportation of prisoners to Penitentiary under Section 13413, R. S. Mo. 1939.
24-46	Feb 5	PUBLIC SCHOOL RETIREMENT SYSTEM.	May use money collected to maintain office and incidental expenses.
24-46	Mar 29	Mr. G. L. Donahoe	WITHDRAWN
24-46	Apr 26	Mr. G. L. Donahoe	WITHDRAWN
24-46	May 16	PUBLIC SCHOOL RETIREMENT SYSTEM.	Prior service credit not allowed in PSRS under House Bill 151 for time served in the armed forces by a teacher.
24-46	July 18	SHERIFF'S FEES.	Sheriff is entitled to retain fees earned in juvenile proceedings.
24-46	Aug 3	DEPARTMENT OF AGRICULTURE.	Warehousemen licensed under Art. 1, Chap. 141, R.S. Mo. 1939, not subject to provisions of House Bill 164.
25-46	Nov 25	MAGISTRATES.	Magistrates may not have any connection with a law suit even though it was filed prior to assuming office.
26-46	Jan 2	COUNTY COURTS.	The County Court of Adair County is not authorized to donate money for a building in which to locate a glove factory in the City of Kirksville, Missouri.
26-46	Jan 3	STATE TEACHERS COLLEGE.	The money derived from the sale of a car belonging to the Southwest Missouri State Teachers College by the State Purchasing Agent should go into the Southwest Missouri State Teachers College Fund.
26-46	July 5	Hon. Walter A. Eggers	WITHDRAWN
26-46	Dec 31	MAGISTRATES.	(1) Magistrate may not require fee for solemnization of marriage; (2) Magistrate cannot be compelled to solemnize marriages.
27-46	Jan 2	PROBATE JUDGES.	Probate Judge shall be licensed to practice law in this state, except that probate judges in office at the time of the adoption of the Constitution of 1945, may succeed themselves without being so licensed.

27-46	Mar 11	TAXATION AND REVENUE.	Liability for tax of property exempt therefrom on date of assessment.
27-46	June 4	TAXATION AND REVENUE.	Corporation continuing to exercise corporate privileges after the beginning of current taxable year liable for tax.
27-46	July 12	JUSTICE OF THE PEACE.	Power to issue a warrant.
27-46	July 23	TAXATION AND REVENUE.	Liability of corporation to file annual statement with State Tax Commission.
27-46	Sept 3	SCHOOLS.	Directors irregularly elected are de facto directors and if they refuse to serve, the County Superintendent may appoint directors in their place.
27-46	Oct 14	TAXATION.	The mode of assessing gas companies for tax purposes.
27-46	Nov 19	ELECTIONS.	In case of a tie vote for clerk of the county court, the sheriff of the county calls a special election at the direction of the county clerk. Withdrawal of one candidate after a tie vote cannot avoid a special election.
28-46	Apr 8	CONSTITUTION OF 1945. MAGISTRATE COURTS.	Authority of judges of circuit courts to establish additional magistrate courts in counties of 30,000 inhabitants or less.
29-46	May 14	INSURANCE. TRUCKERS.	Deduction for insurance premiums by Commission Merchants or truckers carrying livestock from farm to market are illegal where the carrier falls within the jurisdiction of the Public Service Commission, if the total charges exceed the rate allowed by the commission; are illegal if the insurance is not carried whether the trucker is within jurisdiction of the Public Service Commission or not; and where insurance is carried may or may not be legal according to the contract entered into between shipper and trucker.
31-46	Oct 19	SCHOOLS. COUNTY SUPERINTENDENT.	County Superintendent in Fourth Class county; (1) is entitled to his actual necessary traveling expenses; (2) can employ a clerk without the consent of the county court; (3) can employ a teacher as clerk who performs the duties of clerk outside his teaching hours.
32-46	Oct 14	SCHOOLS.	(1) Senate Bill 162 – reinvestment of certain school funds. Senate Bill 186 – election favoring annual distribution of liquidated funds, such funds credited to the school funds desired by school board. (2a) Threat of epidemic authorizes board to require vaccination before school attendance. (2b) If vaccination rule is adopted, parent not in violation of compulsory school law for not permitting child to be vaccinated.
33-46	Mar 6	DRAINAGE DISTRICTS.	Section 12435, R. S. 1939, authorizes the county court to use the

			maintenance fund of the drainage district to pay engineering costs incidental to estimate of cost of cleaning ditches of drainage district.
33-46	July 1	JONES-MUNGER LAW.	Costs to be assessed against a purchaser at a tax sale. Purchaser of property upon which homestead rights are established not entitled to possession during period of redemption.
33-46	July 10	SHERIFFS. COUNTY COURTS.	Under House Bill 899 the sheriff is responsible for feeding prisoners in the county jail in counties of the third class.
33-46	Sept 20	SCHOOLS.	School district does not have the power to improve adjacent city streets and this power is given to cities of the fourth class by Section 7197, R. S. Mo. 1939.
34-46	Mar 12	CONSERVATION COMMISSION AND FISH AND GAME.	Section 40(a) Article IV, Constitution 1945, is self-enforcing and it is not necessary for the Legislature to enact a statute permitting the Conservation Commission to promulgate rules and regulations. Construing House Bill #366.
34-46	Oct 10	SPECIAL ROAD DISTRICTS. ROADS AND BRIDGES. WARRANTS.	Board of commissioners of special road district (benefit assessment type) may issue warrants up to amount of revenue anticipated for year in which such warrants are issued, and may by contract provide protested warrants shall bear interest at a specified rate. If no such provision is in the contract, protested warrants shall bear interest at 6%.
34-46	Oct 23	Hon. Clark H. Gore	WITHDRAWN
35-46	Mar 6	CONSTITUTIONAL LAW.	Under Sections 18 and 25, Article 5, Constitution of 1945, justice of the peace not licensed to practice law cannot hold offices of probate judge and magistrate in counties with 30,000, or less, inhabitants.
35-46	Mar 25	MARRIAGE LICENSES.	Filing of health certificates prior to the issuance of the licenses.
35-46	Apr 24	BARBERS.	Applicant for renewal of certificate of registration must pass examination if certificate is not renewed within two years, though part of time was spent in military service.
35-46	July 5	SCHOOLS AND STATE.	The Washington Technical School of St. Louis, Mo. in operating a barber school is subject to the provisions of Sec. 10134, R. S. Mo. 1939. The Board of Barber Examiners is authorized to refuse permission to take barber examinations to persons who have not graduated from a licensed barber college, if said persons are attempting to qualify under the provision of Section 10133, R. S. Mo. 1939, that they have attended a properly appointed and conducted barber school for a certain length of time.
36-46	Jan 4	Hon. Quentin Haden	WITHDRAWN
37-46	July 31	CHIROPODY.	Unlawful to administer foot treatments as defined in Section 9796,

			R.S.Mo. 1939, without a chiropody license. Unlawful to advertise, using title or chiropodist or other similar designations, if not a licensed chiropodist.
37-46	Aug 9	SCHOOLS.	Under House Bill No. 770, county court issues warrant to pay clerk hire.
37-46	Aug 13	COUNTY OFFICERS.	Compensation of various county officers to be received for performance of their duties as members of the county board of equalization.
37-46	Aug 30	CHIROPODY.	A certificate to practice chiropody issued by the State Board of Health is valid. Licensee, now a resident of Missouri, is entitled to a certificate for ensuing year upon making proper application and paying the required fee.
37-46	Oct 10	CHIROPODY.	Qualifications for taking chiropody examinations given by State Board of Chiropody.
37-46	Dec 18	CORONERS.	Entitled to receive salaries under House Bill No. 880 from October 6, 1946.
38-46	Mar 1	MOTOR VEHICLES. CRIMINAL PROCEDURE.	There must be transfer of title at the time of sale. Several questions regarding jurisdiction over juvenile offenders.
38-46	June 14	SCHOOL DISTRICTS.	Section 10484, Revised Statutes of Missouri, 1939, is applicable to consolidated school district as well as city, town or village school districts.
38-46	Sept 21	MARRIAGE LICENSE.	Requirement of marriage health certificate that certificate of physician be obtained by all persons applying for a marriage license and that laboratory report be rendered to a physician, held invalid under the present law.
39-46	July 2	UNEMPLOYMENT COMPENSATION.	1) Unemployment Compensation funds are not necessarily state funds; 2) neither are they such taxes as to require them to be paid into the State Treasury or appropriated out by law.
40-46	Apr 22	AND TAXES.	Commissioners of public benefit assessment road district organized under Article XI, Chapter 46, R. S. Mo. 1939, unauthorized to make a tax levy under Section 3716, R. S. Mo. 1939, either with or without an election by the people.
40-46	Sept 13	ELECTIONS.	Names of persons written in on a primary ballot should not be placed upon the official ballot for the general election.
40-46	Oct 18	CONSTITUTIONAL LAW. MAGISTRATES.	Under Section 24, Article V, Constitution of 1945, and Section 2811.103, Missouri R. S. A., preparing state and federal income tax returns is doing law business.

41-46	Jan 28	MISSOURI REAL ESTATE COMMISSION.	Authority to promulgate regulations requiring proof of registration of fictitious name as a condition precedent to securing Missouri real estate broker's license.
41-46	Mar 30	MISSOURI REAL ESTATE COMMISSION.	Fees to be charged for real estate licenses issued to copartnerships, associations or corporations.
41-46	Apr 23	SAVINGS AND LOAN SUPERVISION.	Supervisor and assistants not entitled to pay from January 12, 1946 to January 28, 1946.
41-46	June 17	MISSOURI REAL ESTATE COMMISSION.	Effect of entry of plea of nolo contendere, followed by probation, upon right of a person to obtain or retain a real estate broker's or salesman's license.
41-46	Aug 29	TAXATION AND REVENUE.	Liability for taxation of royalties received from lease of patent.
41-46	Oct 7	MISSOURI REAL ESTATE COMMISSION.	Status of person convicted in Federal Court and subsequently pardoned by President with respect to right to license under the Missouri Real Estate Commission Act.
41-46	Oct 8	TAXATION AND REVENUE.	Liability for Missouri intangible personal property tax of the St. Louis Bank for Cooperatives.
41-46	Oct 8	TAXATION AND REVENUE.	Missouri sales tax properly deductible from bank tax computed under House Bill No. 888 of the 63rd General Assembly.
41-46	Oct 28	TAXATION AND REVENUE.	Determination of net income of pawnbrokers under House Bill No. 948 of the 63rd General Assembly.
41-46	Dec 3	CIRCUIT COURTS. FEES AND SALARIES.	Circuit Judge entitled to change of venue fee earned under Section 1074, R.S. Mo. 1939, but not paid to the circuit judge prior to the effective date of S.C.S.S.B. No. 442.
41-46	Dec 3	CIRCUIT COURTS. FEES AND SALARIES.	Circuit Judge entitled to change of venue fee earned under Section 1074, R.S. Mo. 1939, but not paid to the circuit judge prior to the effective date of S.C.S.S.B. No. 442.
42-46	Apr 4	BUILDING AND LOAN ASSOCIATIONS.	Intent of Legislature to protect savings and loan associations from acts of omission is satisfied by provision of savings and loan blanket bond, Form 22, lines 92-93. Lines 101-102 of Form 22 not in conflict with Section 29 of House Bill 481.
42-46	Aug 26	SAVINGS AND LOAN SUPERVISION.	Holder of Installment Shares retired by directors of association entitled to receive full value thereof and earnings to date of retirement.
43-46	July 31	INDIGENT INSANE. COUNTY COURT. PROBATE COURT.	Under S. B. No. 284 the probate court is the only count which as the power to commit indigent insane.

44-46	Jan 10	TOWNSHIP.	Not authorized to appropriate township funds to make deposit in county treasury of sum fixed by county court as probable amount of damages to landowners in a proceeding on petition of 12 freeholders of township to establish road ordered established at cost of petitioners.
44-46	Apr 25	Hon. David E. Impey	WITHDRAWN
44-46	July 22	FACTORIES.	Sec. 10175, R. S. Mo. 1939, does not apply to employees of an electrical construction company making rural electrical installations.
44-46	Sept 11	CORPORATIONS. LICENSES. NURSES ASSOCIATION.	The District No. 2, Missouri State Nurses' Association is not a charitable organization and is subject to licensing under Sections 10161 to 10164, R. S. Mo. 1939.
45-46	May 6	HOTEL. BOARD OF HEALTH.	Y.M.C.A. of St. Louis required to pay hotel license fees.
45-46	May 9	STATE BOARD OF HEALTH.	Adoption subsequent to 1917 must be by court decree.
45-46	May 13		Opinion Letter to the Honorable Owen G. Jackson
45-46	May 13	BOARD OF HEALTH. FEE.	Fee for inspection of soft drinks and beverages.
45-46	May 16		Opinion Letter to the Honorable Owen G. Jackson
45-46	May 29	INTER-INDEMNITY & RECIPROCAL INSURANCE CONTRACT.	In an application for license for reciprocal or inter-indemnity insurance contracts, the attorney in fact in qualifying for the license under paragraph (f) of Sec. 6080, R.S. Mo. 1939, need not state in the declaration that "100 separate risks" have been taken for automobile insurance. Automobile insurance under said paragraph (f) is exempted from the "100 separate risks" clause. Under said clause (f) the word "or" permits either 1000 applications to be made on 1000 motor vehicles, or 1 application to be made covering 1000 motor vehicles. Bodily injury and property damage may be included in the aggregate sum of \$1,500,000.00 liability. The \$1,500,000.00 of insurance contracted under said paragraph (f) may be covered in three applications of \$500,000.00 each.
45-46	June 12	STATE BOARD OF HEALTH.	Question of what the surname of a child should be.
45-46	June 19	FOREIGN INSURANCE COMPANIES.	Foreign insurance companies are not required to comply with either Sec. 5809 or Sec. 5826, R.S. Mo. 1939, with respect to capital stock being paid up in full, if the State of its domicile does not so require. A foreign insurance company does not violate the terms of Sec. 6035, R.S. Mo 1939, if it holds some of its own stock, not absolutely or as

			collateral, but holds the same merely for conversion purposes of Preferred stock into Common stock or Common stock into Preferred stock.
45-46	July 2	DIVISION OF HEALTH.	Political subdivisions may continue to participate financially with the Division of Health for health services in their political subdivision.
45-46	July 16	DIVISION OF HEALTH.	A Deputy State Commissioner of Health has jurisdiction throughout the County, including the cities of said County, and the laws of this State do not provide for a Deputy State Commissioner of Health in incorporated cities of less than 75,000 inhabitants.
45-46	Aug 21	INSURANCE.	Articles of the Association of the Group Casualty Underwriters, Inc., a Mutual Company.
45-46	Aug 28	INSURANCE.	Increase of stock of Transit Casualty Company of St. Louis.
45-46	Sept 17	INSURANCE.	Approval of increasing capital stock of the Missouri Insurance Co.
45-46	Sept 23	INSURANCE.	Arts. of Inc. of the Group Fire Underwriters, Inc.
45-46	Oct 4	TAXATION. SALES TAX. NATIONAL BANKS.	Sales of tangible personal property to national banks are not subject to the Missouri retail sales tax.
45-46	Nov 9	INSURANCE.	Approval of documents of Western Life Ins. Co., St. Louis, Mo.
45-46	Nov 19	MR. W. O. JACKSON	WITHDRAWN
45-46	Nov 22		Opinion Letter to the Honorable Owen G. Jackson.
45-46	Dec 19		Opinion Letter to the Honorable Owen G. Jackson.
45-46	Dec 19		Opinion Letter to the Honorable Owen G. Jackson.
45-46	Dec 21		Opinion Letter to the Honorable Owen G. Jackson.
46-46	Feb 8	BLIND PENSIONS. CONSTITUTIONAL LAW. PROBATE COURTS.	Under Constitution of 1945 probate judges may continue to perform duties under the provisions of Section 9454, R. S. Mo. 1939.
46-46	Apr 15	BLIND PENSIONS.	Construing Section 9451, page 786, Laws of Missouri, 1943.
46-46	Apr 17	BLIND PENSION.	Maintenance costs granted applicant for blind pension while attending school under the rehabilitation program does not constitute income or money received from any source as provided in Section 9451, R. S. Mo. 1939.
46-46	June 5	BARBER BOARD.	Barber with revoked license may apply for renewal within 90 days of revocation.
47-46	Feb 7	OFFICERS.	Vacancy in office of county surveyor would be filled by appointment by

		VACANCIES.	the Governor.
47-46	Aug 27	SCHOOLS.	Consolidated school district to maintain action against directors of component districts to recover property of such districts.
47-46	Sept 24	CONSTABLES.	The office of constable will be abolished as of January 1, 1947, or at the expiration of the term of the present constable if after January 1, 1947.
48-46	May 2	TIME.	County officers of Iron County to operate on CST.
48-46	June 12	COUNTY CLERKS. CONSTITUTIONAL LAW. CONSERVATION COMMISSION.	County Clerks may continue to receive fees as agents for the Conservation Commission in the sale of hunting and fishing licenses.
48-46	July 8	SHERIFFS. CONSTITUTIONAL LAW.	House Committee Substitute for House Bill No. 872 is effective as of July 1, 1946. House Committee Substitute for House Bill No. 872 is not in conflict with Sec. 13 of Art. VII of the Constitution of 1945. Payment of salaries of sheriffs of counties of the fourth class would not be in violation of county Budget Law.
48-46	July 23	MAGISTRATE COURTS.	Magistrate courts may issue writ of habeas corpus.
48-46	Nov 19	ELECTIONS.	A canvasser, who has qualified, casting up the absentee votes is under the duty of certifying to the County Court the result of his canvass, and this is so regardless of the number of votes or whether there are any absentee votes.
48-46	Dec 5	CRIMINAL LAW. ABSENTEE VOTING.	Venue of crimes conducted with absentee voting is in county where affidavit and ballot are received and cast.
49-46	Oct 30	GENERAL ASSEMBLY.	Contingent expense appropriation of 63rd General Assembly limited to expenses of that Assembly.
49-46	Dec 11	APPROPRIATIONS.	Legislature is required to enact all other appropriation bills prior to the appropriation bill for expenses of the General Assembly.
50-46	Mar 12	STATE DEPARTMENT OF AGRICULTURE.	Commissioner may determine extent of analysis of agricultural seeds.
51-46	Apr 10	PUBLIC SCHOOL RETIREMENT SYSTEM.	Trustee of PSRS appointed by State Board of Education who is resident of school district included in retirement system but not employee thereof, is qualified to hold that office.
51-46	July 20	SCHOOLS. NURSES.	Paragraph 4, Section 10029, R. S. Mo. 1939, does not give the Board of Nurse Examiners any power or control over schools and classes of nursing not accredited or registered.

53-46	Apr 20	Hon. Harry T. Limerick, Jr.	WITHDRAWN
53-46	June 25	SCHOOLS.	Interpretation of the meaning of “actual and necessary traveling expenses” as applied to county superintendent of schools.
56-46	Jan 3	AFFIDAVITS.	An attorney-in-fact may not swear to the registration and anti-trust affidavit of a corporation under Sec. 119, page 472, Laws of Mo., 1943. Exception found in this section not applicable under the facts presented.
56-46	Feb 28	CRIMES AND PUNISHMENT.	Obtaining money by false pretenses; oppression in office; exacting illegal fees by sheriff; officer accepting bribe.
56-46	Oct 8	OFFICERS.	The Assessor and Coroner of Jasper County shall be paid according to the Laws of the 63rd General Assembly after July 1, 1946; members of the County Court and the County Clerk of Jasper County shall be paid according to the Revised Statutes of Missouri of 1939, during their present term.
57-46	Mar 28	PROBATE JUDGE.	Not entitled to practice law after present term.
57-46	Apr 11	CONSTITUTIONAL LAW. PROBATE JUDGE.	Under Section 25, Article V, Missouri Constitution 1945, incumbent probate judge cannot succeed himself if not in office when Constitution was adopted, unless licensed to practice law.
57-46	June 5	ROADS AND BRIDGES.	Commissioners of road districts formed under Article 11, Chapter 46, R. S. Mo. 1939, elected by voters of district who qualify under Section 11469, Laws of Missouri 1943, Page 555.
57-46	July 15	TAXATION AND REVENUE.	Basis to be used for computation of merchants ad valorem tax.
57-46	July 16	Mr. W. V. Mayse	WITHDRAWN
57-46	Sept 26	TAXATION.	Levying of taxes by directors of school districts and the right of the county court to amend such levies when such court is making the levy of taxes on railroads and other carriers for the rolling stock, road bed and movable property of such carriers.
58-46	June 12	PENSIONS.	Funds for payment of firemen’s and policemen’s pension must come from source set out in pension plan adopted.
58-46	Aug 13	SPECIAL ROAD DISTRICTS. OFFICERS.	Treasurer of special road district is guilty of no criminal violation when trucks to be used by the road district are purchased from a firm of which he is president and principal stockholder, but if the treasurer is also a commissioner of the road district, the contract is against public policy.
58-46	Dec 30	PROBATE JUDGE.	1. After January 1, 1947, cannot be paid anything for services other

			than his salary; 2. Can appraise estates for inheritance tax purposes without appointing appraisers, but cannot be paid extra for said service.
59-46	May 27	MOTOR VEHICLES. FUEL TAX.	State Inspector of Oils cannot by rule extend provisions of law to require license from persons not included in statute.
59-46	Oct 9	CONSTITUTIONAL LAW. COUNTIES.	Under Section 31, Article VI, Constitution of 1945, the City of St. Louis is recognized as a county. Under C.S.H.B #476 the City of St. Louis would be a county of the first class and laws applicable to such counties would apply to the City of St. Louis.
60-46	Jan 16	SCHOOLS.	School districts cannot issue bond to buy school busses.
61-46	Feb 4	DRAINAGE DISTRICTS.	In a county having township organization the County is liable for assessed benefits to roads in a drainage district which was organized under the County Court Drainage law.
61-46	Mar 29	POOL HALLS.	Club operating pool hall and charging members for use of cues must procure license.
62-46	May 18	ELECTIONS.	A person is entitled to the whole of the last day allowed by law to file for office, and it is the duty of the county clerk, or deputy, to be available all of this day.
62-46	June 26	JAILS. CONTRACTS. COUNTY COURT.	Building jail and constructing vaults are separate projects, to be paid for out of separate funds, and contracts for each project must be let to lowest bidder.
62-46	July 11	RECORDER OF DEEDS. CONSTITUTION.	Compensation of incumbent recorders in counties of the second class not to be increased as provided in House Bill No. 897 during present term of office. Should reappoint deputies.
62-46	Oct 3	Herbert S. Miller, M. D.	WITHDRAWN
62-46	Dec 5	Hon. Edwin W. Mills	WITHDRAWN
63-46	Apr 26	ELECTIONS. BOND ISSUE.	A bond issue for a county hospital may be submitted at a primary election.
63-46	Aug 2	MARRIAGE.	Marriage is not void when performed after expiration of license date.
63-46	Sept 9	Hon. Roscoe D. Moore	WITHDRAWN
63-46	Nov 19	SHERIFFS. NEPOTISM.	The employment by a sheriff in a county of the third class of this wife to cook the meals for prisoners, for which the sheriff is reimbursed, violates Sec. 6, Art. VII, Constitution of Missouri.
64-46	Feb 9	BANKING	Under the order of the Commissioner of Finance for a banking

		CORPORATION.	corporation to restore impaired capital, the directors of such corporation may personally sign a guaranty or place property in escrow with a contract that such property may be held by the Commissioner of Finance, or other person designated, until the capital impairment of such corporation is restored from normal earnings or if need be, to sell such assets and apply the proceeds to such repairment. Such contract should be definite respecting the rights of all parties as to the holding, sale or withdrawal of such property.
64-46	Mar 28	BANKS.	A bank and an endorser may not by contract fix or limit the liability of an endorsement contrary to the terms of Section 7952, Laws of Missouri, 1943.
64-46	Mar 29	BANKS.	Under sub-section (e) of Section 7952, Laws of Missouri, 1943, page 995, such drafts or bills of exchange therein named are not exempted from the restrictions of sub-section 1 of said Section 7952, where such drafts are not drawn against "actually existing values" as contemplated by said sub-section (e) of said Section 7952. The drawing of such drafts due 30, 60 and 90 days from date would constitute a loan liability of the individual, partnership, corporation or body politic borrowing money from a bank and must be computed as such.
64-46	May 24	BANKS-TRUST COMPANIES.	Banks or trust companies may not accept assigned life insurance policies as security for loans under Section 7952 or Section 8032, Laws of Mo. 1943, as security constituting "collateral security having an ascertained market value", and if so used by a bank or trust company to increase the loan ratio of the capitalization of any such bank or trust company above the percentage set out in said Sections, such loan or loans would be excessive.
64-46	July 22	TAXATION AND REVENUE.	Liability for payment of Missouri intangible personal property tax on interest-bearing accounts receivable of foreign corporations doing business in this state.
64-46	July 25	BOARD OF FUND COMMISSIONERS.	Authority to impose charge for reregistration of Series J State of Missouri Road Bonds.
64-46	Aug 3	OFFICIAL BONDS.	Recommended changes in form of bonds and insurance policy for Department of Revenue.
64-46	Aug 20	TAXATION AND REVENUE.	Applicable personal exemptions to be allowed under Missouri income tax law for 1946.
64-46	Oct 7	TAXATION AND REVENUE.	Liability for ad valorem tax on intangible personal property owned by religious educational and charitable institutions.
64-46	Oct 24	OFFICIAL BONDS.	Director of Department of Revenue has no official duties with respect to bonds of township collectors.

64-46	Oct 29	TAXATION AND REVENUE.	Necessity of filing returns for Missouri intangible personal property tax by joint owners.
64-46	Nov 8	TAXATION AND REVENUE.	Investment certificates subject to intangible personal property tax under H.C.S.H.B. No. 868.
64-46	Nov 19	TAXATION AND REVENUE.	National banks not required to file return of income for Missouri income tax purposes.
64-46	Nov 21	TAXATION AND REVENUE.	Dividends received on national bank stock must be included in gross income for Missouri state income tax purposes.
64-46	Dec 5	TAXATION AND REVENUE.	Refunds of taxes paid under House Bills 868, 869, 888 and 948 of the 63rd General Assembly.
64-46	Dec 10	TAXES. INTANGIBLE TAX.	Political subdivisions to which intangible tax is distributed.
65-46	Jan 2	MISSOURI TRAINING SCHOOL FOR BOYS.	Maximum age which boys can be committed to the Missouri Training School for Boys at Boonville, and the use of certified copies of birth certificates as proof of age.
65-46	Jan 7	PARDON AND PAROLE.	Parole can be revoked after expiration date of sentence for violation committed before such date.
65-46	Sept 12	PAROLES.	Inmates of Missouri Training Schools may be paroled by the Board of Training Schools before serving penitentiary sentence.
66-46	Apr 29	SCHOOL BOARDS.	(1). Section 10342A, R. S. Mo. 1939 will operate to re-employ a teacher in the event that its provisions are not complied with. (2) A school board member possessing the deciding vote may not vote for a person within the fourth degree on relationship by reason of Section 10342 R. S. Mo. 1939, nor may his failure to vote be ignored where his silence brings Section 10342A into operation.
66-46	July 1	SHERIFFS.	Sheriffs may personally claim per diem attendance for two courts on the same day providing he can execute the requests or duties imposed upon him by each court.
66-46	Nov 18	LEGISLATURE. RESIGNATION OF SENATOR.	Resignation of Senator during recess of Legislature should be directed to the Governor.
67-46	Mar 7	SCHOOLS.	County court where indigent parents reside must furnish expenses of child in School for the Deaf.
67-46	Sept 18	COUNTY COURTS.	County courts have jurisdiction to entertain proceedings for establishment and vacation of public roads.
68-46	July 26	CONTINGENT FUND OF PROSECUTING	Section 13470, R.S. Mo. 1939, inconsistent with Article VI, Section 13, Constitution, 1945, therefore, ineffective after July 1, 1946.

		ATTORNEYS COUNTIES OF FIRST CLASS. CONSTITUTION.	
68-46	Aug 13	HIGHWAY DEPARTMENT.	The legislature may regulate the Highway Department in any way which is not inconsistent with the limitations imposed upon the legislature by the constitutional provisions of the state or nation.
68-46	Nov 25	CORONER. COUNTY OFFICER'S FEE.	Coroner and employees of Jackson County entitled to charge fee and retain same for rendering unofficial duties not incompatible with statutory duties.
69-46	Apr 17	ELEEMOSYNARY INSTITUTIONS. PURCHASING AGENT.	Purchasing Agent authorized to conduct sale of livestock, produce, etc., produced by eleemosynary institutions and pay proceeds therefrom into revolving fund of institution until such fund reaches \$5000, and any surplus above that paid into state treasury to credit of the fund for the support of eleemosynary institutions.
69-46	May 28	ELEEMOSYNARY INSTITUTIONS. TUBERCULOSIS HOSPITAL.	Hospital fees arising out of compensation litigation should be paid to Commissioners of the Tuberculosis Hospital, who turn such fees over to the Treasurer of the Board.
69-46	July 8	FEES.	Clerk, recorder and sheriffs; third class counties.
69-46	Sept 6	DIVISION OF WELFARE. CONFEDERATE HOME.	The Division of Welfare, being successor to Board of Managers of the State Eleemosynary Institutions, shall have custody of endowment fund for Confederate Home.
69-46	Nov 25	MERCHANTS' LICENSES & BONDS.	1) The tax rate to be charged for merchants' licenses is the same as on real estate. Collector's fees, \$1.00. 2) Merchants' licenses run from Jan. 1. to Jan. 1. 3) If a merchant begins business after the first Monday in Jan. of any year his license would run to the following Jan. 1. 4) The bond of a merchant must be delivered to the Collector at the time license is issued. 5) If a merchant does not obtain and pay for a license for 5 consecutive years immediately preceding application for license for the current year, he must deliver a bond to the collector at the time he obtains his license.
70-46	Jan 8	OFFICERS. COUNTY TREASURERS.	Treasurer cannot receive extra compensation for taking care of accounts of county toll bridges.
70-46	Mar 18	MERCHANT'S TAX.	Corporation which consigns goods to a second corporation for storage and delivery only is liable under Section 11305, R.S. Mo. 1939, for a merchant's tax.

70-46	Apr 2	LANDS.	Federal Government may acquire land in Missouri without the consent of the State for public use.
70-46	Sept 6	TAXATION AND REVENUE.	Necessity of inclusion of name of owner in publication for sale of real property for delinquent taxes.
70-46	Dec 6	Hon. Elmer Peal	WITHDRAWN
73-46	Mar 29	SCHOOLS. CONSOLIDATED DISTRICTS.	Consolidated and Common School Districts may consolidate.
73-46	Apr 19	AUTHORITY OF BOARD OF DIRECTORS OF CONSOLIDATED SCHOOL DISTRICT.	1) May board of directors buy property that is not to be used for school purposes, 2) If they do will they be personally liable.
73-46	July 17	Hon. W. Oliver Rasch	WITHDRAWN
73-46	Nov 7	BARBER BOARD. SCHOOLS.	Public schools have right to teach barbering as vocational course without payment of fee as prescribed in Sec. 10134, R. S. Mo. 1939.
75-46	May 15	INSURANCE. COUNTIES. SPECIAL ROAD DISTRICTS.	Neither the county court nor the commissioners of special road districts organized under Article 10, Chapter 46, R.S. Mo. 1939, are authorized to purchase liability and property damage insurance to insure injury, death or damage resulting from the operation of motor vehicles owned and used in the building and maintenance of the district or county, and there is no need for such insurance.
76-46	May 10	ELEEMOSYNARY INSTITUTIONS.	Validity of claims by state or county, for reimbursement for keep of patient as poor person at state hospitals, against estates of indigent patients.
76-46	July 3	Hon. Horace T. Robinson	WITHDRAWN
76-46	Oct 14	HIGHWAYS AND BRIDGES.	Private citizens are responsible for removing an obstruction from a public road which was created by digging a drainage ditch across the road when they had not formed a legal drainage district.
77-46	Apr 10	STATE DEEDS.	Approval of quit-claim deed to Project No. 23-127F; located at Rolla, Missouri.
78-46	Jan 25	SCHOOLS.	Construing Section 10463, p. 889, Laws Mo. 1943.
78-46	May 31	PUBLIC SCHOOL RETIREMENT SYSTEM.	Employer's contribution to PSRS under H. B. 151 to be paid from school district's Incidental Fund.
78-46	Dec 5	SAVINGS AND LOAN ASSOCIATIONS.	In re investments of funds by county courts in savings and loan associations accounts.

80-46	Aug 10	BOARD OF CURATORS, LINCOLN UNIVERSITY. LENA MARTIN, CLAIMANT.	A devise for life with remainder to the heirs of the body is a contingent remainder, and a daughter of a remainderman who predeceased life tenant takes a share in the real estate.
80-46	Aug 15	SCHOOLS. LINCOLN UNIVERSITY.	Lincoln University is not entitled to share in the seminary fund created under Section 10876, R. S. Mo. 1939.
81-46	Feb 6	MINES. CONSTITUTIONAL LAW.	Constitutional provision changing date of fiscal year does not affect statutory requirement that Mine Inspector must make report in January.
81-46	July 1	SMALL LOANS. CONSTITUTIONAL LAW.	Finance Commissioner has no authority to issue small loan licenses after July 1, 1946.
81-46	July 25	LOAN & INVESTMENT COMPANIES.	Loan and investment companies may present a claim against the State to the Legislature for an appropriation as a refund for unused part of annual license fee, where the license has become inoperative by law. But they may not sue the State.
81-46	Sept 11	Mr. H. G. Shaffner	WITHDRAWN
81-46	Sept 12	CONSTITUTIONAL LAW.	County courts, under the 1945 Constitution, retain jurisdiction to entertain petitions for the incorporation of cities and towns.
81-46	Sept 20	BANKS--LIQUIDATION FIXING FEES AND COMPENSATION OF EMPLOYEES.	It is the duty of the Commissioner of Finance to fix the fees and compensation of employees, in the first instance, in a bank liquidation. If this has not been done, the Circuit Court or the judge thereof in vacation, may fix such charges.
81-46	Oct 7	BANKS—CAPITAL STOCK.	Banks moving into a city of 50,000 or more population must operate under a minimum capital of at least \$280,000. Should city boundaries of a city of 50,000 inhabitants or more be extended to include banks operating under a \$25,000 capital, such banks are not required to increase their capital.
81-46	Oct 7	EDUCATION. SCHOOLS.	The State Board of Training Schools has, with the approval of the Director of Public Buildings, the authority to raze an unsafe building on the grounds of one of the State Training Schools.
81-46	Dec 5	BANKING CODE— BOARD OF APPEALS IN INCORPORATION OF BANKS.	Senate Bill #196 recently passed by the Legislature, has no bearing upon, nor does it interfere with the duties of the Board of Appeals in bank incorporation matters provided for in Sections 7942 and 7943, because said sections, with other sections cited, provide for a complete plan for appeal and review by the Courts.
82-46	Apr 30	TAXATION.	Scheme of taxation of national and domestic banking corporations

			provided in House Bill No. 888 is in lieu of all other taxes which might be imposed upon the tangible and intangible personal property of such corporations.
83-46	Feb 4	STATE PURCHASING AGENT. CONSTITUTIONAL LAW.	The State Purchasing Agent may execute a lease of real property for the Unemployment Compensation Commission of Missouri for a period of time which exceeds two years, provided that the terms of the lease called for payment of rent for the whole period within the appropriation period in which the lease is executed.
83-46	Feb 14	COUNTIES. COUNTY COURTS.	There is no reason nor authority for the county court to take out liability insurance on the employees of the county who work on the public roads of the county.
83-46	Mar 12	SHERIFF. JUVENILE DELINQUENTS.	Sheriff entitled to no allowances for boarding juveniles held by him unlawfully. Sheriff entitled to \$1.25 per day per person for boarding said juveniles if they are held upon formal complaint or information and are being investigated prior to commitment, otherwise to not more than 75¢, amount to be set by county court.
83-46	Apr 17	Hon. Forrest Smith	WITHDRAWN
83-46	June 4	COUNTIES.	The County Court is required to pay the expenses of the County Farm Organization within the limits of the provisions of Section 5 of House Bill 744, 63rd General Assembly.
83-46	June 20	Hon. Forrest Smith	WITHDRAWN
83-46	July 3	STATE PURCHASING AGENT. AUTOMOBILES.	The State Purchasing Agent has the discretion of selling goods to the highest and best bidder, if the highest bids are identical he has the discretion of determining which constitutes the best bid.
83-46	July 12	STATE PURCHASING AGENT. STATE PENITENTIARY.	The money received from the sale of trucks used by the industries of the state penitentiary should be deposited in the state treasury to the credit of the revolving fund of the penitentiary.
83-46	July 30	ELECTIONS. NOMINATIONS.	County committees may fill in candidates for office of county clerk at August 6, 1946, primary election.
83-46	Sept 30	PURCHASING AGENT.	State departments may purchase personal property, through Purchasing Agent, by trading in property to be replaced and paying balance in cash.
83-46	Nov 13	APPROPRIATIONS. CONSTITUTIONAL LAW.	An appropriation act which does not distinctly specify the amount and purpose of the appropriation without reference to any other law is unconstitutional.
83-46	Nov 22	Hon. Forrest Smith	WITHDRAWN
83-46			

83-46	Nov 25	SCHOOLS.	Traveling expenses of county superintendents of 3rd and 4th class counties should be figured against total compensation of said officers.
83-46	Dec 5	CIRCUIT COURTS. SALARIES AND FEES.	Final disposition of change of venue fee under Section 1074, R.S. Mo. 1939.
83-46	Dec 9	COUNTY COURTS. COUNTY HOSPITALS.	The location of the city, town or village in which a county hospital is established under the provisions of Art. 4, Chap. 126, R.S. Mo. 1939, is designated by the county court. The exact site for such hospital is designated by board of trustees.
83-46	Dec 23	CORONER'S INQUEST.	County to pay cost thereof.
83-46	Dec 30	COUNTY CLERKS.	Will not vacate their office until the first Monday in January, 1947.
84-46	Mar 25	HABITUAL DRUNKARDS. PROBATE COURT.	There is no authority for the confining of an habitual drunkard, who does not have manifestation of insanity, in the state insane asylum.
84-46	May 10	ELECTIONS. NOTICE.	Necessary qualifications for newspaper to publish notice.
84-46	May 15	SOCIAL SECURITY COMMISSION.	Section 8, Article VII, Constitution, 1945, applies to officers and not employees.
84-46	May 17	SCHOOLS.	President and Clerk of School District attending county school meeting entitled to 5¢ per mile going and returning.
84-46	June 4	CONSTITUTIONAL LAW. OFFICERS. MAGISTRATES.	Under Section 25, Article V, Constitution, 1945; and Section 3, Senate Bill 207, a de facto officer claiming the office of justice of the peace on February 27, 1945, cannot qualify for the office of magistrate where such officer is unlicensed to practice law.
84-46	July 5	RECORDER OF DEEDS.	Five questions concerning fees for listing and issuing verified copies of discharges in county of the third class under H. B. 772.
84-46	Sept 27	ELECTIONS.	It is necessary in a locality where there is registration of voters for the judges of each political party to initial the ballots in a general election.
85-46	Jan 16	TAXATION AND REVENUE.	Right to exemption from taxation of real property belonging to German Saint Vincent Association.
85-46	Apr 19	Mr. Proctor N. Carter	WITHDRAWN
85-46	July 9	MARRIAGES.	Right of Probate or Circuit Court to order the issuance of marriage license to minors.
85-46	July 16	MOTOR VEHICLES.	Minimum age required for drivers of common carriers under Section 5730, Laws of Missouri 1945, and Section 8447, R. S. Mo. 1939.
85-46	Oct 12	COUNTY COURT. OFFICERS.	Appointee to fill unexpired term of county court is not entitled to increased compensation as provided in House Bill 778, passed by the

		SALARIES AND COMPENSATION.	63 rd General Assembly.
85-46	Nov 12	SHERIFFS. FEES.	Sheriffs allowed fees only upon strict compliance with statute.
85-46	Dec 12	MOTOR VEHICLES.	Liabilities of the Motor Vehicle Unit of the Department of Revenue under House Bill 317.
87-46	Mar 21	Hon. W. W. Sunderwirth	WITHDRAWN
88-46	Apr 10	LEGISLATURE.	Bill must be passed by majority of members elected even though there is a subsequent vacancy in the membership.
88-46	May 10	TAXATION.	Non-profit cemeteries' income from money loaned is taxable.
88-46	May 17	TAXATION. ROADS AND BRIDGES.	The provisions of House Committee Substitute for House Bill 784, passed by the 63rd General Assembly and approved by the governor, does not take away from the special road district the money now in the treasury of such road district, and require it to be paid into the county treasury.
88-46	Oct 11	GENERAL ASSEMBLY. LEGISLATOR.	Representative employed by Director of Revenue on a per diem and mileage basis vacates his office as Representative.
89-46	Apr 17	BLIND PENSION.	Board of Managers of School for the Blind unauthorized to pay expenses of teachers for travel to School for Instruction.
89-46	Aug 20	Hon. D. D. Thorne	WITHDRAWN
89-46	Oct 17	TAXATION AND REVENUE.	Real property owned by religious organization not exempt from taxation when not used exclusively for religious purposes.
90-46	Feb 1	BUILDING AND LOAN ASSOCIATIONS. CONSTITUTION.	Real and tangible personal property assessable by county assessor under House Bill 469. State alone may assess intangible personal property under Article X, Section 4c, Constitution 1945.
92-46	Oct 7	PUBLIC SCHOOL RETIREMENT SYSTEM. CONSTITUTION.	County contributions for Superintendent of Schools do not increase Superintendent's salary so as to contravene Art. VII, Sec. 13, Const. of Mo. 1945.
92-46	Oct 18	MAGISTRATE COURTS.	Providing for establishing and maintaining of offices of magistrates.
92-46	Nov 14	TOWNSHIPS.	Fiscal year of townships shall run from the first Monday in March to the first Monday in March of the next year.
93-46	Jan 29	HIGHWAYS.	Several questions concerning parking of vehicles on state highways, and authority of the Highway Patrol in connection therewith.
93-46	Feb 16	MOTOR VEHICLES.	Passenger car used commercially subject to commercial motor vehicle

			fees.
93-46	Feb 20	COUNTY JAILS.	Necessity of receiving prisoners committed for violation of ordinances of cities of the third class.
93-46	June 4	MOTOR VEHICLES.	Computation of maximum allowable axle load of trucks.
93-46	June 15	PUBLIC SERVICE COMMISSION. SCHOOLS. COMMON CARRIER.	A bus which is used to carry a school band from one town in Missouri to another town is within the exemption provisions of Section 5721 of the Public Service Act of Missouri.
93-46	June 15	CONSTABLES.	Power and duties in all counties except first class counties and the city of St. Louis after June 30, 1946.
93-46	July 11	CONSTITUTIONAL LAW. OFFICERS. INHERENT POWER OF COURT.	Law providing circuit judges shall approve compensation and appointment of deputy sheriffs and deputy circuit clerks is constitutional.
93-46	Aug 29	MOTOR VEHICLES.	Use of truck ordinarily used in hauling commercially, and having only "local commercial license," for transporting farm products for distance of more than 25 miles, where such use not wholly within one municipality or urban community, violates Sec. 8369, Laws 1943, pp. 664-666, and subjects user to penalty prescribed.
93-46	Sept 26	MISSOURI STATE HIGHWAY PATROL.	(1) Necessity of employees of the State of Missouri and of members of Patrol complying with motor vehicle drivers' regulations; and (2) applicability of Motor Vehicle Safety Responsibility Act to employees of the State of Missouri and to members of Patrol.
93-46	Oct 18	DISPOSITION OF GAMBLING MONEY. HIGHWAY PATROL.	When in possession of highway patrol, said money may be retained for evidence, but must be returned after the criminal proceedings.
93-46	Nov 18	Hon. Alvin B. Walker	WITHDRAWN
96-46	Jan 9	PENAL INSTITUTIONS.	Sentences to different institutions are cumulative and not concurrent.
97-46	Jan 4	COUNTY ASSESSORS.	Compensation controlled by statute.
97-46	Feb 4	COUNTY COURTS.	County courts have the power, duty and authority to examine into the facts and law upon which fee bills are based.
97-46	Mar 8	Hon. Hugh P. Williamson	WITHDRAWN
97-46	Mar 20	Hon. David W. Wilson	WITHDRAWN
97-46	Mar 28	INHERITANCE TAX.	Exemption from Missouri Inheritance Tax of bequest to be used for

			establishing the "James L. and Nellie M. Westlake Scholarship Foundation."
97-46	May 18	TAXATION.	Fire clay sold to a refractory not subject to sales tax.
97-46	May 23	Hon. Max R. Wiley	WITHDRAWN
97-46	June 18	PROBATE COURT.	Probate judge entitled to fees which accrued last year of term, but not collected until 1947.
97-46	July 3	Hon. Bryan A. Williams	WITHDRAWN
97-46	Aug 19	SHERIFFS. CONSTITUTIONAL LAW.	Under the new Constitution and the present law the sheriffs of the counties of the state may succeed themselves in office.
97-46	Sept 25	Hon. Hugh P. Williamson	WITHDRAWN
97-46	Nov 7	SCHOOLS.	Organization of common school districts into city, town or village districts.
97-46	Nov 21	COUNTY BUDGET.	Surplus in classes 1, 2 and 4 may be transferred to class 5 to be used as contingent and emergency expenses of the county.
98-46	Mar 12	CONSTITUTION. LEGISLATURE.	Requirement of title.
98-46	Aug 9	CONSTITUTIONAL LAW. COUNTY COURT. ROADS AND BRIDGES. TAXES.	The County Court, in its discretion, may levy a county road and bridge tax under the provision of House Bill No. 784 and, when a petition has been circulated and a road district within the county has voted an additional tax, the county court may levy said additional tax in the district or districts in which voted.
98-46	Nov 27	Mr. Charles A. Witte	WITHDRAWN
99-46	Apr 30	SAVINGS AND LOAN ASSOCIATIONS.	Savings and Loan Association may mortgage, pledge or hypothecate assets as part of its power to borrow under Section 60 of House Bill 481.

27 Smith
COUNTY COURT: Re: County court has power to sell county land and in the absence of specific statutory direction as to the procedure of the sale, only reasonable precautions must be taken.

February 28, 1946

FILED
/

3/4
Mr. George Adams
Prosecuting Attorney,
Audrain County
Mexico, Missouri

Dear Mr. Adams:

This will acknowledge receipt of your letter of recent date requesting information of this department, which letter reads as follows:

"Audrain County a number of years ago built a county hospital under Article 4, Chapter 126, Missouri Revised Statutes, 1939, and has since maintained said hospital.

"The hospital, because of its size, has now become inadequate and the board of trustees is contemplating erection of a new hospital at a new location.

"Please advise what disposition can be made of the old building and grounds and what procedure must be followed with reference to the sale of same."

In answer to the inquiries contained in your letter, we will begin with the particular parts of the Constitution and Statutes which authorize the disposition of county property.

Article VI, Section 7 of the new Constitution authorizes the establishment of a county court and directs that said county court shall manage all county business as prescribed by law. Specifically, the section provides as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business

as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provides by law."

In examining the Missouri Revised Statutes of 1939, and subsequent session laws, we find two sections which deal with the disposition of county property. Section 2480, R. S. Mo. 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

This statute particularly empowers the county court to conduct the sale and conveyance of any real estate which is county property. Section 13784, R. S. Mo. 1939, provides that the county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to the county.

"The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and on behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed. R. S. 1929, Sec. 12125."

Under the Constitution and the two sections of the statutes previously cited and quoted, supra, provision is made for the disposition of county property either by the county court or by a commissioner appointed by said county court for that purpose.

The authority for a county to establish and maintain a

hospital, such as Audrain County has, is found under Article IV, Chapter 126. After a careful examination of said chapter, we failed to find any provision in said chapter that provides a procedure for the disposition of county property obtained under the authority of this chapter. Further, we have examined the general statutes and failed to find any statutes that set up any general or specific procedure for the disposition of county property. There are some sections which do outline a particular procedure for a county to follow when disposing of particular types of property, for example, the sections on swamp land, Sec. 12754, R. S. Mo. 1939; accreted land, Sec. 12790, R. S. Mo. 1939; school lands, Sec. 12717 and following, R. S. Mo. 1939; and county lots, Sec. 13682, R. S. Mo. 1939. Having failed to find any specific or general statutory authority or direction for the disposition of this particular type of property, namely, a county hospital and grounds, we turn to the general principles of law in order to establish some measures or directions under which a county may proceed in the disposition of their property.

In the case of Butler County, Missouri, vs. Campbell, 182 S. W. (2d) 589, 1. c. 592, the following statement is made in regard to the conduct of a county court when dealing with county property:

"* * *They (county court) are required to act with reasonable skill and diligence, and to discharge their duties with that prudence, caution and attention which careful men usually exercise in the management of their own affairs. * * *" (Insert ours)

While we realize that the above quotation lays down no specific procedural steps, it does provide a general basis for the conduct of the county court or the commissioner, should one be appointed, when disposing of county property. In analyzing the statutes cited above, which relate to the disposition of particular types of county property, we find three items that seem to be required as elements of a statutory sale of county property. They are, first, advertising or notice. This may be done either by publication in the county newspaper or by hand bills posted in public places. This advertisement or notice is evidence of the intent of the county to sell such property and apprises the residents of the county of the intention to sell. The length of time that the advertising or notice must be published may vary, but need only comply with the general rule in the Butler case quoted supra. Secondly, there should be a full and complete description of the property to be sold. This description should be sufficient to inform those interested in bidding upon said property, of its extent and character, and is usually contained

in the advertising or notice referred to above. Thirdly, the taking of bids. These bids may be either sealed or open. The bids may also be subject to rejection should the bid not approximate the true value of the property. Further, a partial payment may be required of the bidder at the time of submitting his bid. Any reasonable conditions may be imposed upon the bidder. However, we do not mean to infer that it is absolutely necessary that the items listed above are steps to be followed in the sale of the Audrain County property, in order for it to be considered a legal sale. As our research has shown there is no specific or general statutory direction to be followed in the disposition of this property. We are merely suggesting that the items listed above are appropriate steps to be taken by the county court in the disposition of the Audrain County property, and would reflect the reasonable skill and prudence that a county court is charged to use in the disposition of county property under the Butler case, cited supra.

A sale conducted so as to give adequate notice to the residents of the county of the intended disposition of the property, and the taking of such other reasonable precautions as required by the principle of the Butler case, would be sufficient.

CONCLUSION

It is, therefore, the opinion of this department that, first, the county court may sell county land or may, by order, appoint a commissioner to sell same. Second, there is no general or specific statutory authority providing for the disposition of land or buildings acquired by the county under the authority of Article IV, Chapter 126, R. S. Mo. 1939. Third, the sale of county property, in the absence of a specific statute providing for the procedure to be used in such sale, must be conducted with reasonable diligence and prudence.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General
WCB:mw

SHERIFFS IN COUNTIES
OF THE THIRD CLASS:

Shall collect all fees, both criminal and civil, and shall collect the amount as provided by existing fee statutes; the sheriff and county court may not enter into an agreement to pay the sheriff a flat 5¢ a mile for his mileage; sheriff shall bill the county court at the end of each month for feeding prisoners and for mileage.

July 10, 1946

FILED
/

Honorable George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This department is in receipt of your recent request, based on the following:

"Section 3 of House Bill 899 relates to salary and compensation of sheriffs in counties of the Third Class and requires the sheriff to charge and collect 'every fee both civil and criminal, including mileage accruing to his office by law, etc'.

"Does this mean that the sheriff shall continue to charge ten cents a mile on arrests and return of prisoners to his county as heretofore, which mileage shall be turned over to the county; or is the mileage referred to in Section 3 meant to be the officer's actual expenses covered in Section 5?

"If acceptable to the county court, would a straight five cents a mile charge as expenses for the sheriff's car be proper for the use of said car in serving warrants and other criminal process?

"I assume that the sheriff should, as the prosecuting attorney has, turn over to the county at the end of each month

every cent paid him as criminal fees and then by separate bill request reimbursement from the county for his various actual traveling expenses plus actual cost of feeding prisoners."

As to question No. 1, your attention is called to House Bill No. 899, Section 3, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 13547.303, page 461, which is as follows:

"It shall be the duty of the sheriff in counties of the third class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, except such criminal fees as are chargeable to the county, and such sheriff shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act said fees were charged and collected, together with the names of the persons paying or who are liable for same, which report shall be verified by the oath or affirmation of such sheriff. It shall be the duty of such sheriff upon the filing of said report to forthwith pay over to the county treasurer all fees arising in connection with the investigation, arrest, prosecution, custody, care, commitment and transportation of persons accused of or convicted of a criminal offense during the month * * * *"

You specifically ask about mileage. It will be noted this section provides the sheriff shall collect all fees including mileage accruing to his office by law.

The second question deals with the collection of fees or the amount of fees to be collected by the sheriff. The existing fee statutes have not been changed as yet, and since House Bill No. 899, Section 3, provides for fees accruing to his office by law, he will collect all fees now prescribed by statute. Directly answering your question, the sheriff will

collect ten cents per mile for the arrest and return of prisoners, turn same into the county and bill the county for his actual expense not to exceed five cents per mile. An agreement with the county to accept a flat five cents per mile for traveling expense would not be in conformity with House Bill No. 899, Section 5, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 13547.305, page 461, which is as follows:

"In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual expenses for each mile travelled in serving warrants or any other criminal process not to exceed five cents per mile."

While it is clear that this expense will, in all probabilities, always amount to five cents per mile or more, an agreement for a flat five cents per mile would not be permissible.

House Bill No. 899, Section 3, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 13547.303, supra, provides that the sheriff shall turn over to the county all criminal fees collected by him.

House Bill No. 899, Section 4, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 13547.304, page 461, provides the method by which the sheriff shall be reimbursed for feeding prisoners, and is as follows:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether

or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. * * *

House Bill No. 899, Section 5, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 13547.305, supra, provides for the sheriff's mileage. Both Sections 13547.304 and 13547.305 are self-explanatory.

Conclusion.

It is the opinion of this department that House Bill No. 899 requires the sheriffs in counties of the third class to collect all fees, both civil and criminal, and the amounts of said fees will be the sum fixed by the existing fee statutes; that an agreement between the sheriff and the County Court, setting a flat five cents per mile for his mileage, would not be his actual mileage as prescribed by said House Bill No. 899, and would not be permissible; also that the sheriff shall turn over to the county, at the end of each month, all criminal fees collected by him and present his claim to the County Court for mileage and the feeding of prisoners.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

WBD:ml

APPROVED:

J. E. TAYLOR
Attorney General

INDEMNITY:
DISEASED ANIMALS:

Purchaser of a tubercular steer, which was purchased for butchering, is not entitled to indemnity even though the carcass was destroyed on order of State Veterinarian as unfit for consumption by human beings.

FILED
/

September 12, 1946

Honorable George Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

We are in receipt of your letter of August 27, 1946, requesting an official opinion of this department, and replying as follows:

"The operator of a local meat market who kills his own meat for retail sale purchased a beef and after it was slaughtered noticed that it appeared diseased. He had the State Veterinarian come to Mexico for the purpose of testing the beef. The test showed that it was tubercular and he destroyed the same to prevent its sale and consumption by human beings.

"Section 1402 R. S. Missouri, 1939, and associated sections do not seem to be clear as to the question of indemnity due this merchant.

"I would appreciate your advising whether or not under the above conditions the merchant is entitled to indemnity for the beef which he has destroyed.

"Certainly he did the humane thing in calling the State Veterinarian's attention to the carcass and it seems wrong for him to have to stand all of the loss."

The general rule in regard to payment of moneys to an individual by the state is that no state official can pay out

the money of the state except pursuant to statutory authority authorizing and warranting such payment. State ex rel. Bybee v. Hackmann, 207 S. W. 64, 276 Mo. 110; State ex rel. Bradshaw v. Hackmann, 208 S. W. 445, 276 Mo. 600.

The statutes authorizing the payment of indemnity for neat cattle affected with tuberculosis are Sections 14196, 14199, 14200, 14201, 14202 and 14204, R. S. Mo. 1939.

Section 14196, R. S. Mo. 1939, provides that the owner of neat cattle affected with tuberculosis, and who shall have the same in quarantine under the provisions of article 11, Chapter 102, R. S. Mo. 1939, may have the same appraised and receive indemnity therefor.

Section 14199, R. S. Mo. 1939, provides that the owner of neat cattle affected with tuberculosis and condemned and quarantined on account thereof by the State Veterinarian, or his deputy, shall elect whether he will keep a part or all of the cattle affected with tuberculosis in isolation for breeding purposes, or whether he will have a part or all of such diseased neat cattle appraised and slaughtered. It is further provided in said section that all neat cattle for which indemnity is claimed by the owner shall be shipped under a legal permit in writing by the State Veterinarian, or his deputy, if such animals are to be killed within this state, or under a permit in writing by a representative of the United States Department of Agriculture if such cattle are to be killed at a point outside of this state.

Section 14200, R. S. Mo. 1939, provides for the owner receiving indemnity for the destruction of tuberculous cattle, to be paid by the county, state and federal government, and provides that a duly authorized agent of the State Department of Agriculture or a duly authorized agent of the United States Department of Agriculture, either, as the federal authorities may elect, acting with the owner, shall jointly constitute an appraising committee. If such committee fail to reach an agreement, a disinterested third party shall be called in and a majority decision shall be final. This section further provides that an itemized account of the appraisement of each individual head of cattle shall be made out and signed by the owner, the representative of the State Department of Agriculture, or a representative of the United States Department of Agriculture, and by the third party when such third party is called upon to act as a joint appraiser, and that said account shall be made out in triplicate, one copy to be sent to the Commissioner of Agriculture and one copy to the County Court. It is further provided in this section that after such appraisal

the condemned cattle shall be sent to slaughter, and a report of the net proceeds derived from the sale of such diseased cattle shall be ascertained by the Commissioner and deducted from the appraised value. The section further provides for the payment of certain percentages of the difference between the appraised value of such condemned cattle and the salvage from the sale thereof.

Section 14201, R. S. Mo. 1939, provides for the appraisal of neat cattle condemned on account of tuberculosis in Missouri, in cases not under State and Federal cooperation. The section further provides for the appraisal of the condemned cattle by a representative of the State Department of Agriculture or a member or representative of the County Court in the county where such neat cattle are located, acting with the owner of the condemned cattle. In case of disagreement a disinterested third party shall be called in as a member of the appraising committee, and a majority vote of the committee shall determine the appraisement of such neat cattle. The section further provides for the percentage to be paid by the state and the county in case such condemned cattle are sent to slaughter and the report of the difference between the appraised value of such cattle and the amount received as salvage.

Section 14204, R. S. Mo. 1939, provides for the shipment, after appraisal, of cattle condemned and in quarantine on account of tuberculosis, by their owner, under the supervision of the State Veterinarian, to any slaughtering plant which is provided with state or federal meat inspection service, to be slaughtered and disposed of under the rules of meat inspection.

Section 14202, R. S. Mo. 1939, provides, in part, that "no indemnity shall be paid for neat cattle affected with and quarantined on account of tuberculosis if such cattle became (a) diseased through any willful neglect or scheming on the part of the proprietor, or (b) which were already diseased when they came into the possession of said proprietor." This section further provides that "no indemnity whatsoever shall be paid by either the state or county for neat cattle condemned on account of tuberculosis unless the owner thereof co-operates with the state or Federal authorities in having all of the cattle owned by him tested for tuberculosis and by carrying out the disinfection of his premises according to official instructions, as far as necessary, to complete the eradication of the disease on his premises."

It is clear from the above quoted statutory provisions that two things are necessary in order to receive any indemnity for the slaughter of neat cattle affected with tuberculosis. The first is that said neat cattle must be in quarantine. Second, the procedure as laid down by the statutes regarding appraisal of said neat cattle by a committee composed of the owner and a representative of the State or Federal Department of Agriculture, or in certain cases a member or representative of the County Court, and in cases of disagreement a disinterested third party, must be followed.

It is clear that the statutory provisions above quoted provide for the payment of indemnity to the owner of neat cattle, and there is no provision made for the payment to any slaughterer who may purchase said cattle, but it is provided that any of said tuberculous cattle which are to be slaughtered must be marked and shipped under the direction of the State Veterinarian, and their salvage value determined and the indemnity paid on the difference between the salvage value received from slaughtering such animals and their appraised value. The provision in Section 14202, R. S. Mo. 1939, that no indemnity will be paid when cattle were already diseased when they came into the possession of an owner further limits the payment of any indemnity in this case.

It is clear that no statutory authority exists which would authorize the state to pay any indemnity for the destruction of a steer which was affected with tuberculosis and which was slaughtered by the operator of a local meat market.

CONCLUSION

It is the opinion of this department that the operator of a local meat market who purchased a steer which was affected with tuberculosis, and which was destroyed because it was unfit for consumption by human beings, is entitled to no indemnity from the state because of such destruction.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

DEPT. OF AGRICULTURE--

AGRICULTURAL & VEGETABLE SEEDS:

: Neither agricultural nor vegetable seeds may be sold or offered for sale in the State of Mo. under Sec. 14271, Art. 16, Chap. 102, R.S. Mo. 1939, nor may rules or regulations be adopted under Sec. 14272, unless such seeds are free from the seeds of Canada thistle, Johnson grass, and field Bindweed (*convolvulus arvensis*)

December 16, 1946

Department of Agriculture
Jefferson City, Missouri

Attention: Honorable S. Y. Roth
Director Seed Division

12/19
FILED
/

Gentlemen:

This will acknowledge your letter of recent date to this Department requesting an opinion on the subject matter covered in your letter. Your letter is as follows:

"Will you please give us a written opinion as to whether or not Regulations #10 and 11, relative to tolerances on noxious weeds, apply to Section 14271, of the Missouri State Seed Law.

"We have held that the tolerances do not apply to the above mentioned Section and that Agricultural and Vegetable seed cannot be sold in the State of Missouri if they contain any Canada thistle, Johnson grass or field Bindweed seed whatsoever.

"An opinion at your earliest convenience will be appreciated."

Your letter specifically requests the construction by this Department of the terms of Section 14271, R.S. Mo. 1939, and the application thereto of regulations #10 and #11 in the booklet of regulations adopted by your Department.

Section 14272, upon which you base your rules set forth in said booklet for the enforcement of Article

Department of Agriculture -2-

16 of Chapter 102, R. S. Mo. 1939, must be read and applied in connection with Section 14271, the same Article, same Chapter.

Said Section 14271, is as follows:

"It shall be unlawful for any person, firm, or corporation to knowingly sell, offer or expose for sale or distribution in this state, for the purpose of seeding, any of the agricultural seeds as defined in this article, unless the said seeds are free from the seeds of Canada thistle, Johnson grass, and field bindweed (*convulvulus arvensis*)."

Manifestly and necessarily, regulations #10 and #11 in the booklet issued October 1, 1944, by your Department, are an interpretation of the power and authority, delegated to the Department of Agriculture in Section 14272, looking to the enforcement of Article 16 and Chapter 102, R. S. Mo. 1939. Indeed, the pamphlet is direct and clear on that point since it states in the preamble thereto on page 3, the following:

"The following 'regulations' are adopted by John W. Ellis, Commissioner of Agriculture, under the authority granted by Section 14272 of Article 16, Chapter 102, R.S. Mo. 1939."

Section 14272, R.S. Mo. 1939, under which your said regulations #10 and #11 are promulgated, is as follows:

"The duty of enforcing this article and carrying out its provisions and requirements shall be vested in the commissioner of agriculture. The said commissioner, upon notice to the seed trade of this state, through the agricultural bulletins of the department and otherwise, shall be empowered to adopt such reasonable 'rules and regulations' necessary to secure the efficient enforcement of this article:

Provided further, that the said commissioner shall have authority to maintain a laboratory with necessary equipment within biennial appropriations, and is authorized to assign any of his employees without additional salary to aid in the administration of this article, and shall further be required to secure an analyst or analysts and other necessary employees and designate reasonable remuneration therefor, for the proper enforcement and carrying out of the provisions of this article. It shall be the duty of the said commissioner within his discretion and appropriations to publish or cause to be published the results of the examination, analysis and test of any sample or samples of agricultural seed or mixture of such seed, drawn as provided for in this section, together with any other information said commissioner may find advisable."

Keeping in mind that said Section 14272, as quoted above, directs that your Department "* * * shall be empowered to adopt such reasonable 'rules and regulations' necessary to secure the efficient enforcement of this article: * * * ", it is clear that said "rules and regulations" to be adopted and which have been adopted by your Department, may permit and prescribe the method of doing all of the things under said rules that are not forbidden in any other Section of said Article 16. Turning again to said Section 14271, we observe that it expressly prohibits the sale of "any of the agricultural seeds as defined in this article, unless the said seeds are free from the seeds of Canada thistle, Johnson grass, and field bindweed (*convulvulus arvensis*)."

Regulations #10 and #11 set forth in said booklet of your Department under said Section 14272, are prohibited, we think, from including any seeds to be sold under the terms of said Section 14271, "unless the said seeds are free from the seeds of Canada thistle, Johnson grass, and field bindweed (*convulvulus arvensis*).", and in determining the number or rates of occurrence for tolerated noxious weed seeds authorized to be sold under said regulations #10 and #11.

Said Section 14271 prohibits the inclusion of the seeds banned by it in the sale of "* * * any of the

agricultural seeds as defined in this article, * * * ". These sections mentioned and quoted are, with others, all a part of Article 16, Chapter 102, R.S. Mo. 1939. The regulations named in this booklet setting forth the analysis of tolerances of certain "noxious weed seeds" may not include "the seeds of Canada thistle, Johnson grass, and field bindweed (*convulvulus arvensis*)"., because they are prohibited altogether from being sold under any provisions of said Article 16, or any regulations made under said Article.

This result would not be affected by the adoption of the Federal Seed Act as a part of said regulation number 11, or the tolerances specified therein.

The enactment of Article 16, Chapter 102, R.S. Mo. 1939, by the Legislature of this State was, and is, we think, a reasonable and proper exercise of its police powers by the State as an attribute of sovereignty of the State. The police powers incident to the exercise of independent sovereignty of the several States were never surrendered by the States to the Federal Government upon the adoption of the Federal Constitution. 12 C.J., page 910, states it this way:

"Under the American constitutional system, the police power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states. * * * ".

Footnote 38 under the above quoted text of Corpus Juris cites many cases from the United States Supreme Court, and the high Courts of many of the States, in harmony with the text quoted. So it will be seen that the Legislature was empowered to, and did, enact said Section 14271, as a part of said Article and Chapter as police regulations, to provide for the general welfare of the State. Keeping this in mind, we think the tolerances prescribed in the said Federal Seed Act would be subordinate to the terms of said Section 14271, which prohibits the inclusion under any conditions, or for any purpose, "the seeds of Canada thistle, Johnson grass, and field bindweed (*convulvulus arvensis*)" in any seeds offered for sale or sold under said Article and Chapter.

We believe you properly interpret the terms of

said Sections 14271 and 14272, and the intent of the Legislature therein expressed, when you establish and follow the practices in your Department set forth in paragraph 2 of your letter, which is as follows:

"We have held that the tolerances do not apply to the above mentioned Section and that Agricultural and Vegetable seed cannot be sold in the State of Missouri if they contain any Canada thistle, Johnson grass or Field Bindweed seed whatsoever."

We trust this will answer your questions.

CONCLUSION.

It is, therefore, the opinion of this Department that no agricultural or vegetable seeds as defined in Article 16, Chapter 102, R.S. Mo. 1939, may be offered for sale or sold in the State of Missouri "unless the said seeds are free from the seeds of Canada thistle, Johnson grass, and field bindweed (*convolvulus arvensis*)."

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

MAGISTRATES:
PROSECUTING
ATTORNEYS:
COUNTY COURTS:

Judge of probate court in counties of less than 30,000 inhabitants is ex officio judge of magistrate court. Additional clerks, deputy clerks and employees may be provided for magistrate court by county court, where necessity exists, their salaries to be paid by county. Stenographic services for probate judge are paid for by the county out of Class 4 as provided in Budget Act. Clerk of magistrate court may receive pay for stenographic work done for probate judge. Clerk of magistrate court may act as stenographer for probate judge, and will be paid for such services in addition to his salary as clerk of magistrate court. Stenographic services for prosecuting attorney may be paid for by county out of Class 4 as provided in Budget Act.

December 11, 1946

FILED

2

2 p 2 Smith
Andrew County Court
Savannah, Missouri

Gentlemen:

Reference is made to your letter of recent date, requesting an official opinion of this department, and reading as follows:

The County Court of Andrew County, Missouri, in anticipation of questions that will arise over salaries and fees of County officers in Andrew County, Missouri, ask opinions on the following subjects:

"1. What is the salary of the Magistrate of Andrew County, by whom and how is he paid?

"2. Does the office of the Probate Judge and Magistrate merge or is he ex officio officer of either office, or are they separate and distinct offices?

"3. What is the highest amount that can be paid for deputy hire of magistrate, by whom is this salary set and paid?

"4. Up to what amount, if any, is the County compelled to pay for services of a stenographer of the Probate Judge and if any, out of what budget fund is this to be paid?

"5. Can a Deputy Magistrate receive salary

or compensation for services for stenographic work done for the Probate Court, payable from the County Treasurer, in addition to salary as deputy Magistrate?

"6. Is there any reason why a deputy magistrate cannot act as a stenographer for the Probate Court and draw compensation for such work and at the same time draw a monthly salary as a deputy magistrate?

"Our proposition is this: J. W. Mitchell has been elected Probate Judge and Magistrate of Andrew County at the last election. He is now asking the Court to pay in addition to \$125.00 per month, salary of deputy Magistrate, the further sum of \$25.00 per month, anticipated amount for stenographic services, and we are in a quandary to know what legal right we would have to pay this \$25.00 stenographic service for the Probate Court, stenographic service, if so, is this amount payable to the Probate Judge or to the person performing the services.

"Also, we would like to know if we are to pay stenographic services for the office of the Prosecuting Attorney, if so, how much and from what fund?"

We note that Andrew County, in 1940, had a population of 13,015, and in 1944 had an assessed valuation of \$18,363,835. Section 17 of Senate Bill No. 207 of the 63rd General Assembly provides, in part, as follows:

"The salaries of all magistrates shall be paid by the state, except that the state shall not pay the salaries of additional magistrates whose offices are created by order of the circuit court as provided for in Article V, Section 18 of the Constitution; but the districts assigned to such additional magistrates shall be designated as 'additional magistrate districts' and the salaries of such magistrates shall be paid by the county. The annual salaries of magistrates shall be as follows:

" * * * in all counties now or hereafter having a population of more than 11,000 inhabitants but not more than 17,000 inhabitants, with an assessed valuation of more than \$11,000,000 the sum of \$3600; * * *"

Therefore, the salary of the magistrate of Andrew County will be \$3600 per year.

Section 18 of Article V of the Constitution of Missouri provides, in part, as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants, or less, the probate judge shall be judge of the magistrate court. * * *"

Section 1 of Senate Bill No. 207 provides, in part, as follows:

"Magistrates, as herein provided for, shall be elected at the general election to be held in 1946, and every four years thereafter, and shall hold their offices for four years, or until their successors are elected or appointed, commissioned and qualified: Provided, however, in counties of 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. * * *"

"Ex officio" is defined in Ballentine's Law Dictionary as "from or by virtue of the office."

It is clear, from the constitutional and statutory provisions above quoted, that the magistrate holds the office of magistrate by virtue of the fact that he is probate judge, and we, therefore, hold that the probate judge is ex officio judge of the magistrate court.

Section 21 of Senate Bill No. 207 provides, in part, as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and

fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required. * * * "

Section 22 of Senate Bill No. 207 provides, in part, as follows:

"Salaries of clerks, deputy clerks and employees provided for in the last preceding section shall be paid by the state within the limits herein provided upon requisition filed by the judge of the magistrate court; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in Section 1 of this act shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

"* * * in all counties now or hereafter having a population of more than 11,000 inhabitants but not more than 17,000 inhabitants, with an assessed valuation of more than \$11,000,000, the sum of \$1500; * * * "

The salaries of the clerks, deputy clerks and employees of the magistrate court are fixed by the magistrate. The salaries of those clerks, deputy clerks and employees of the magistrate court of Andrew County who are paid by the state cannot exceed a total of \$1500 annually. The county court may provide additional clerks, deputy clerks or employees, if the need exists in the county, and the salaries of such additional clerks, deputy clerks and employees are paid by the county.

In this connection, we wish to call your attention to the fact that there is no such office as deputy magistrate, but that the magistrate may hire a clerk, deputy clerks or other employees.

In connection with your question regarding the amount, if any, that the county is compelled to pay for services of a stenographer of the probate judge, we are enclosing a copy of an opinion written under date of February 19, 1945, to the Honorable Forrest Smith, State Auditor, which we believe answers your question in this regard. The amount to be paid for such stenographic services should come out of Class 4 expenses, as provided in Section 10914, R. S. Mo. 1939.

In regard to your question relative to the services of a "deputy magistrate," by which we presume you mean a clerk, deputy clerk or other employee of the magistrate court, acting as stenographer for the probate court, your attention is directed to Section 22 of Senate Bill No. 207, which provides, in part, as follows:

" * * * When the judge of the probate court is also judge of the magistrate court, such judge, in his discretion, may designate one or more of such clerks, deputy clerks or employees as clerks, deputies or employees in the probate court."

With regard to the question as to the payment to the prosecuting attorney for moneys expended by him for stenographic services, your attention is directed to the case of Rinehart v. Howell County, 348 Mo. 421, 153 S. W. (2d) 381, parts of which are quoted in the opinion rendered to Honorable Forrest Smith, a copy of which is enclosed, and in which the direct question you have asked in your letter is answered. Under the ruling in Rinehart v. Howell County, you will see that it is a matter of fact to be determined as to what payment should be made to reimburse the prosecuting attorney for his expenses with regard to stenographic services. This money should also be paid from Class 4, as provided in Section 10914, R. S. Mo. 1939.

CONCLUSION

It is the opinion of this department:

(1) The salary of the magistrate of Andrew County is \$3600. Said magistrate is paid by the state.

(2) The probate judge in counties of less than 30,000 inhabitants is ex officio judge of the magistrate court.

(3) The salaries of clerks, deputy clerks and employees of the magistrate court are fixed by the magistrate. The salaries of the clerks, deputy clerks and employees who are paid by the state cannot exceed a total of \$1500 per year. The county court may provide for additional clerks, deputy clerks and employees for the magistrate court, where the need exists, and the salaries of such additional clerks, deputy clerks and employees are paid by the county.

(4) Stenographic services for the probate judge, if necessary for the proper performance of the duties of such probate judge, in a reasonable amount, may be provided by the county, or the county may reimburse such probate judge for payments he has made for stenographic services. These payments should be made out of Class 4 as provided in the Budget Act.

(5) The clerk, or deputy clerk, of a magistrate court may be compensated by the county for stenographic work done for the probate judge, or the probate judge may be reimbursed for payments he has made to such clerk, or deputy clerk, for stenographic services performed by such clerk for the probate judge.

(6) The clerk, or deputy clerk, of the magistrate court may also act as stenographer for the probate judge, and will draw his salary as clerk, or deputy clerk, of the magistrate court and be paid by the county for such stenographic services, or the probate judge may be reimbursed for payments he has made to such clerk, or deputy clerk, for stenographic services for the probate judge.

(7) One who acts as stenographer for the prosecuting attorney may be paid by the county, or the prosecuting attorney may be reimbursed in a reasonable amount for moneys

Andrew County Court - 7

paid by him for stenographic services. This payment should be made out of Class 4 as provided in the Budget Act.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

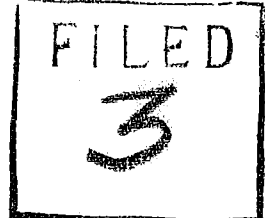
CBB:HR

CIRCUIT JUDGES: The General Assembly has the power to
increase the salary of circuit judges
CONSTITUTIONAL LAW: during their term of office.

October 4, 1946

Filed: #3

Mr. E. G. Armstrong, Comptroller
Department of Revenue
Jefferson City, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

"Senate Bill 442 fixes the salary of certain circuit judges.

"Will you please advise us the effective date of this bill, and furnish us an opinion as to when the changes in salary listed in this bill become effective as to incumbents in office."

You have presented two questions for opinion which will be answered in the order in which they are found in your request.

Senate Bill 442, relating to the compensation of circuit judges, was truly agreed to and finally passed before July 8, 1946, and subsequently approved by the Governor. The General Assembly recessed July 8, 1946 until 12:00 o'clock, August 7, 1946. Before recessing they passed a joint resolution, under the terms of which all laws passed by the General Assembly on or before July 8, 1946, and not effective by special provision, shall take effect ninety days from and after the beginning of the recess. This is in accordance with Section 29, Article III of the Constitution of 1945, which reads in part as follows:

"* * * provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Mr. E. G. Armstrong

Therefore, Senate Bill 442 will become effective October 6, 1946.

The second question presented by your request is when will the salary changes relating to circuit judges in Senate Bill 442 become effective as to incumbents in office. As we have pointed out above, since Senate Bill 442 becomes effective October 6, 1946, all circuit judges affected by the bill would be incumbents in office. This raises a constitutional question of whether or not Section 13, Article VII of the Constitution of 1945 is controlling and prohibits the General Assembly from increasing the salary of circuit judges during their term of office. Section 13, Article VII of the Constitution of 1945 reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Section 24, Article V of the Constitution of 1945, pertaining to the compensation of judges, reads in part as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. * * * * *

At first blush it would seem that the two above quoted sections of our Constitution are in conflict. Section 24 of Article V, dealing exclusively with the compensation of judges, does not specifically deny the General Assembly the power to increase their salaries during the term; but Section 13, Article VII prohibits the General Assembly from increasing the compensation of state, county and municipal officers during their term of office. Therefore, it will be necessary to apply the rules of constitutional construction so that we may determine the scope of application and the meaning of these two provisions.

In construing a constitution we should consider all provisions bearing on the same subject. In the case of State v. Adkins, 284 Mo. 680, 1.c. 693, the court said:

" * * * It is a fundamental rule of construction of all writings, whether they

Mr. E. G. Armstrong

be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and not to destroy their plain intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle."

When applying the above principle we must go even further and resolve seemingly overlapping provisions of the Constitution by harmonizing them. We should avoid a construction which renders any section meaningless or inoperative, and should lean to a construction that would render both sections operative, rather than one which may make a section idle and nugatory. State ex rel. Crutcher v. Koeln, 61 S.W. (2d) 750, and State on Inf. McKittrick, Attorney General, v. Williams, Sheriff, 144 S.W. (2d) 98.

A second principle of constitutional construction that we believe applicable in this case is that specific provisions should prevail over the general provisions when they affect the same subject matter. Citing the case of State ex rel. Gordon v. Becker, Secretary of State, 49 S.W. (2d) 146, this general rule, as set out in 16 C.J.S., Sec. 25, p. 65, reads as follows:

"When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply.

"Where there is a conflicting specific and general provision, or a particular intent which is incompatible with a general intent, the specific provision or particular intent will be treated as an exception, and should

Mr. E. G. Armstrong

receive a strict, but reasonable construction. * * * *"

Further authority may be found for this principle in *People v. Smith*, 327 Ill. 11; *People v. Field*, 66 Colo 367, and *State v. Carter*, 77 Okla. 28.

It can readily be seen that Section 13 of Article VII is a general provision applying to all state, county and municipal officers, while Section 24 of Article V applies only to judges. Therefore, in applying the two preceding rules of construction, by looking to both sections, since they affect the same subject matter that is before us, and since Section 24 of Article V is a specific section, affecting judges only, then this section does not contain any constitutional prohibition on the General Assembly regarding compensation of circuit judges. In reading this section it is noted that the only prohibition on the General Assembly is that the salary shall not be diminished during a judge's term of office. There being no other prohibition on the General Assembly they would be able to increase the salary of a circuit judge whenever they deemed it necessary by virtue of the principle that a state constitution is not a grant of power to a legislature, but a limitation thereon and the legislature may pass laws on any subject not forbidden by state or federal constitutions. *State ex rel. McDonald v. Lollis*, 33 S.W. 98, 326 Mo. 644; *State ex rel. Gaines v. Canada*, 113 S.W. (2d) 783, 342 Mo. 121.

After determining that Section 24 of Article V is controlling in regard to our problems, it will be necessary to examine this section more closely. When interpreting a section of a constitution the intent and purpose of the lawmakers is of primary importance in determining its true meaning and scope. *State ex rel. Harry L. Hussmann Refrigerator & Supply Co. v. St. Louis*, 5 S.W. (2d) 1080, 319 Mo. 497; *Graves v. Purcell*, 85 S.W.(2d) 543, 337 Mo. 574. Further, authority may be found in *State ex Inf. Norman v. Ellis*, 28 S.W. (2d) 363, 325 Mo. 154, where the court stated, 1. c. S.W. 367:

" * * * There is another rule superior to that, which is that the intention of the lawmakers and Constitution makers must be gathered when interpreting an act or a constitutional provision. * * *"

In ascertaining this intent we believe it proper to examine the debates of the Constitutional Convention so that we may de-

Mr. E. G. Armstrong

termine what was in the minds of the framers of our organic law when they adopted this particular section. We further realize that there is a limit to the reliance that may be placed on these debates, as was pointed out in State ex rel. Donnell v. Osburn, 147 S.W. (2d) 1065, wherein the Court said, l. c. 1068:

"In the debates before the Constitutional Convention of 1875 which proposed Section 3, it seems to have been agreed that upon aggregating the votes from the face of the returns the candidate with the highest vote would prima facie be entitled to the office and to enter upon his duties. Any attack upon the returns would have to be made thereafter by a contest before the general assembly. See Debates of the Missouri Constitutional Convention of 1875 by Loeb and Shoemaker, Vol. IV, p. 428, et seq. We refer to the debates with knowledge of the rule which limits the reliance which may be placed in them. State ex rel. Heimberger v. Board of Curators, 268 Mo. 598, 188 S.W. 128."

After a thorough reading of this case it will be noticed that, regardless of their stated rule of limited reliance, the court did in fact actually use the record of the proceedings to ascertain the true intent of the lawmakers. As declaratory of the rule that the records of the Constitutional debates may be examined to determine the true meaning of a section of the Constitution, we direct your attention to Ex parte Oppenstein, 233 S.W. 440, wherein the Supreme Court said; l. c. 444:

"This substitute was rejected by a vote of 42 to 23. Three members were absent. The power to inspect and examine the ballots in 'judicial proceedings' would have been given by this amendment. The convention rejected it.

"It is clear from this that the constitutional convention had before it, in the proposed substitute section, the very question which counsel discuss. This sub-

Mr. E. G. Armstrong

stitute would have expressly given the authority now sought to be exerted. When the convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section."

In a very recent case before the Supreme Court en banc, they again relied on the Constitutional debates to determine the true intent and meaning of a section of the Constitution. We quote from State ex rel. Montgomery et al., County Judges, v. Nordberg, Clerk of County Court, et al., 193 S.W. (2d) 10, 1.c. 12.

"An examination of the Journal of the Constitutional Convention discloses that the main purpose prompting the adoption of Sec. 23 was to facilitate state bookkeeping, so to speak. Thus it was stated by Dr. McCluer, on the 145th day, Friday, May, 19, 1944, p. 2417: 'The principal change is in the date of the fiscal year from the calendar year to the dates as indicated, a change which is desirable to bring the fiscal business of the state in line with that of the nation and for other reasons that were set forth by representatives of the State Auditor's office.'

"Again, Mr. Hemphill, apparently reading from a memorandum prepared by the State Auditor, said:

"'The efficiency of every department of the state government would be materially benefitted and the lost motion which occurs during the first six months period following the meeting of the Legislature will be done away with. * * * * *

"'If this change is made, the only confusion which would result is the confusion which would still exist in cities and counties where the fiscal year and the calendar year coincide. However, this could easily be

Mr. E. G. Armstrong

corrected by the Legislature when it next meets, by creating a statute fixing the fiscal year of the county and the city the same as the fiscal year of the state."

In examining the Constitutional debates on Section 24, Article V, we note that an amendment was offered which is found on pages 2739 and 2740 of Part 6 of the Stenotype Transcript of the Debates, and reads as follows:

"PRESIDENT: Are there any amendments?

"MR. TEE: I have an amendment, please
"(Amendment submitted and read as follows.)

AMENDMENT NO. 1 FOR SUBSTITUTE NO. 1
FOR SECTION 24. Amend Mr. Righter's substitute for Section 24 by inserting the words 'increased or' between the words 'be and diminished' in line 6 of said substitute as the same appears on page 16 of the Journal of May 25, 1944.

"PRESIDENT: Do you move the adoption of the amendment?

"MR. TEE: I do.

"(Motion was seconded.)

"MR. TEE: Now, Mr. President, I have called attention to the sentence in Section 24 of the Committee's report reading as follows and found in lines 2, 3, 4 of the section. 'No judge's salary shall be increased or diminished during his term of office.' Now, the Committee gave that part of the section a great deal of attention. Those words were not placed in there without consideration. Those words are also found in the present Constitution and I believe they should continue to be part of the Constitution with reference to this subject matter. Now, I . . .

"MR. BRADSHAW (Interrupting): Mr. President, may I interrogate Mr. Tee?

Mr. E. G. Armstrong

"PRESIDENT: Does the gentleman yield?

"MR. TEE: I do.

"MR. BRADSHAW: Mr. Tee, is not the same purpose served by Section 6 of File No. 7? I am reading here from the Phraseology report which provides the compensation of state, county and municipal officers shall not be increased during the term of office nor shall the term of any officer be extended?

"MR. TEE: That was the very action that I was about to refer to.

"MR. BRADSHAW: Is there any reason for your amendment?

"MR. TEE: I think so because I am of the belief from remarks here made that this section, as amended, 24, as amended, would be considered an exception to their language in File No. 7 which you just read.

* * * * *

"MR. TEE: Well, it all means the same thing. Now, there is no reason why that this salary or this compensation should not be fixed and it should not be susceptible to be juggled around and juggled around like it has been or like this amendment would permit it to be in one direction only. Judges, those men who are competent to be judges, I think are competent to decide, that is to understand the terms upon which the office to which they aspire and which is offered and I think it not an unjust thing to expect them to continue throughout the term of that office upon the terms upon which it is offered. We are not taking any undue advantage of those people by making the limitation on both ends of this matter. I think it should be retained."

After a long discussion (found in the Debates on pages 2738 to 2751) on the merits of allowing the General Assembly to increase the salaries of judges during their terms of office,

Mr. E. G. Armstrong

the amendment was defeated, clearly showing the intention of the framers of the Constitution to leave this problem to the wisdom of the General Assembly.

Also, when interpreting a section of the Constitution we should look to the history of the particular section. In the case of Application of Lawrence, et al., Gramling, et al. v. Lawrence, et al., 185 S.W. (2d) 818, the Supreme Court had before it a problem that necessitated the interpretation of a section of the Constitution that had been changed by amendment. The court said at l. c. 819:

"* * * We think the latter is clearly evident upon a consideration of the history of the constitutional and statutory sanctions of the practice of absentee voting. To hold otherwise would be to say that the then existing statutory requirement of presence within the state, as an incident of the process of voting, was merely continued without change. Such, we think, was not the case."

To the same effect is the following from State ex rel. McGaughey v. Grayson, 163 S.W. (2d) 335, l. c. 338:

"In determining the meaning and extend of a constitutional provision the reason for its adoption must be borne in mind. Therefore, we may look to the history of the times and the conditions existing when the Constitution was framed and adopted."

Section 33, Article VI of the Constitution of 1875 dealt with compensation of judges and read as follows:

"The judges of the Supreme, Appellate and Circuit Courts, and of all other courts of record receiving a salary, shall, at stated times, receive such compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

Here again is, clearly, evidence that the delegates to the Constitutional Convention intended to give the General Assembly the power to increase the salary of judges during their term

Mr. E. G. Armstrong

of office, because the words "increased or" were left out of the new section affecting compensation of judges of the Constitution of 1945.

CONCLUSION

Therefore, it is the opinion of this department that Senate Bill 442 will become effective October 6, 1946, and, it is further our opinion that the circuit judges of this state should be paid, after October 6, 1946, in accordance with Senate Bill 442.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

APPROPRIATIONS: Applicability of House Bill No. 837 of the 63rd General Assembly to expenditures made by Central Missouri State College.

November 22, 1946

FILED

3

11/25

Mr. E. G. Armstrong, Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Attached hereto is a copy of a letter received from Mr. G. W. Diemer, president of Central Missouri State College at Warrensburg, Missouri requesting a credit of \$266,661.22 under the provisions of House Bill No. 837.

"Will you please advise us if this request complies with the requirements of House Bill No. 837 and if a credit to the Central Missouri State College in the amount asked for would be in order."

The letter received by you from Mr. G. W. Diemer, President of Central Missouri State College, and referred to by you in your request for an official opinion, reads as follows:

"Under House Bills 932 and 837 the CENTRAL MISSOURI STATE COLLEGE recently purchased from the College Dormitory and Development Association the Laura J. Yeater Hall for women, at a cost of \$250,000, for which amount revenue bonds are now being issued.

"All furnishings in Laura J. Yeater Hall belong to the College, and for the new wing which was occupied at the opening of the school term in September of this year, the college purchased from Agency Funds, furni-

ture and equipment in the amount of \$16,661.22. The total investment of the College in the Laura J. Yeater Hall, building and site, and in the furnishings of the new wing, is therefore \$266,661.22. This project is a part of the dormitory program of the CENTRAL MISSOURI STATE COLLEGE, as provided under House Bill 837. I am therefore asking that we be allowed credit by the Comptroller for the above amount, under the matching provisions of House Bill 837."

House Bill No. 837 of the 63rd General Assembly became effective on July 3, 1946. It is an appropriation bill appropriating money out of the Missouri Post War Reserve Fund to various state educational institutions for the purpose of assisting such institutions in developing a program of dormitory, dining room, social and recreational facilities. This assistance is to be given such institutions upon a basis of matching with state money expenditures made by the several institutions under a program for the construction or purchase of facilities of the types enumerated in the Act. Under the provisions of paragraph F of Section 1 of the Act, there has been appropriated for such purposes to the Central Missouri State Teachers College a maximum of \$452,500.00.

We note in the letter received by you from President Diemer that the Central Missouri State College has issued \$250,000.00 of revenue bonds, which have been used to purchase the Laura J. Yeater Hall for women, which is a dormitory located in Warrensburg, Missouri. We also note that in addition to the purchase of the building proper, an additional sum of \$16,661.22 has been expended for the purchase of furniture and equipment to outfit the dormitory. Each of such expenditures has been made subsequent to the effective date of House Bill No. 837 of the 63rd General Assembly, and has been made as a part of the program of the Central Missouri State College under the provisions of House Bill No. 837 of the 63rd General Assembly. In the opinion we shall consider the expenditures separately.

With respect to the purchase of the Laura J. Yeater Hall, we note that such purchase has been consummated through the use of the proceeds of the sale of revenue bonds in the sum of \$250,000.00. The issuance of such bonds by state educational institutions has been authorized under the provisions of House Bill No. 932 of the 63rd General Assembly. In the premises, we think the following portion of House Bill No. 837 of the 63rd General Assembly to be pertinent:

"Section 3. No funds provided under provisions of Section 1 of this Act shall be expended unless equally matched by funds provided for by the issuance of revenue bonds by the respective institutions or funds, other than State appropriated moneys, supplied by the respective institutions or from federal grants made to them for such purposes. Provided however, that the cost of any dormitory now under construction or which may be purchased or reconstructed which shall provide a part of the program under the provisions of this Act shall be considered as matching funds as required in this section." (Emphasis ours.)

You will note that under this section of the Act, no state moneys are to be made available to the institutions except upon such institutions providing matching funds. Such matching funds must be derived from other sources than state appropriated moneys. The revenue bonds issued under the provisions of House Bill No. 932 of the 63rd General Assembly do not represent state appropriated moneys, and, in accordance with the terms of the Act, are payable solely and only from the net income and revenues of the projects for the construction or purchase of which they are issued. Furthermore, in order to qualify for the matching funds available under House Bill No. 837 of the 63rd General Assembly, it is necessary that the purchase of existing facilities be made as a part of a program under the provisions of the Act mentioned.

Applying these requirements to the statement found in the letter of President Diemer that the existing facility has been acquired by use of the proceeds arising from the sale of revenue bonds, that such purchase has been consummated subsequent to the effective date of House Bill No. 837 of the 63rd General Assembly, and that the acquisition of such facility constituted a part of the program of the Central Missouri State College under the provisions of said Act, we reach the conclusion that such expenditure is one that entitles the Central Missouri State College to a matching appropriation of \$250,000.00 from state funds, as provided in House Bill No. 837 of the 63rd General Assembly.

With respect to the expenditure of \$16,661.22 for furniture and equipment in the existing facility, a different question presents itself. At the outset, we note from President Diemer's letter that the money used for such purchase arose from Agency Funds and did not constitute a part of any state appropriation to the college. We also note that the acquisi-

tion of the furniture and equipment constituted a part of the program of the college under the provisions of House Bill No. 837 of the 63rd General Assembly. To this extent, the expenditure is clearly within the requirements of House Bill No. 837 of the 63rd General Assembly. The only remaining question to be resolved, then, is whether or not the proviso in the Act, allowing expenditures representing the "cost of any dormitory" to be considered as matching funds, comprehends within its definition, not only the physical structure, but also the furniture and equipment necessarily incident to the operation of the dormitory. The letter of President Diemer does not precisely indicate whether "furniture and equipment" is limited only to movable personal property such as beds, chairs, desks, etc., or whether it also includes property which has become affixed to the realty and has become an integral part thereof, such as heating and plumbing facilities. However, we do not believe that this distinction is of great importance.

It is, of course, a primary rule of construction of statutes that the intent of the Legislature be ascertained. We quote from *Metropolitan Life Ins. Co. v. Scheufler*, 180 S. W. (2d) 742:

" * * * our first duty, in construing a statute of our state, is to ascertain the intent of our legislature. * * *"

Further, in interpreting a statute, the purpose of the law should be ascertained. We quote from *Wallace v. Woods*, 102 S. W. (2d) 91:

" * * * "the manifest purpose of the statute, considered historically," is properly given consideration. * * *"

Considering the reasons which prompted the enactment of House Bills Nos. 837 and 932 by the 63rd General Assembly, we give due regard to the fact that a critical shortage of housing facilities then existed at the various state educational institutions as a result of the return of many members of the military forces whose programs of educational advancement had been interrupted. Examining the titles of the two bills, it becomes quite apparent that they were enacted for the purpose of, first, authorizing the various state educational institutions to provide funds for the construction or purchase of housing, recreational and social facilities, and, secondly, to assist in such programs by the state itself spending state revenue in aid thereof. The titles of the bills clearly indi-

cate that they were designed not solely for the purpose of aiding in the construction or purchase of mere physical structures, but were intended to assist in procuring, in addition, the necessary equipment therefor. With this in mind, we believe that the phrase "cost of any dormitory," as used in Section 3 of House Bill No. 837 of the 63rd General Assembly, is not limited to the mere physical structure, but is inclusive of necessary operating equipment and furniture.

While we have been unable to find any cases directly holding that the term "dormitory," standing alone, includes within its definition the furniture and other necessary equipment to make it useful for the purpose for which designed, we do believe that such is the logical result to be reached in comparing certain other definitions. For instance, we find the following definitions of "schoolhouse" in 38 Words and Phrases, Perm. Ed., page 321:

"'Schoolhouses,' as used in Comp. St. sec. 1885, providing that the board of school trustees shall have power to build or remove schoolhouses, when directed by a vote of the district to do so, does not mean simply the house, but refers rather to the school, including the general equipment, furniture, maps, charts, globes, and pupils and teacher. State v. Marshall, 32 P. 648, 649, 13 Mont. 136."

"In a statute providing that the school trustees shall have power to remove 'school-houses' when directed by a vote of the district, the term 'schoolhouse' does not mean simply the house, but refers rather to the school plant, including the general equipment, furniture, maps, charts, globes, and pupils and teacher. A school board cannot disregard the right of the people to say what shall be done with reference to the permanent location of the school. State ex rel. Bean v. Lyons, 96 P. 922, 923, 925, 37 Mont. 354, quoting and adopting definition in State ex rel. Jay v. Marshall, 32 P. 648, 13 Mont. 136."

Also, the following definition of "building" is found in 5 Words and Phrases, Perm. Ed., page 875:

"Where power is conferred 'to raise the means and erect a new building' for school purposes, it should be held to include the right to procure and pay for ordinary equipment. Board of Commissioners of Buncombe County v. Malone, 101 S. E. 552, 553, 179 N. C. 110."

The cases cited, together with other cases holding that the power to erect a building necessarily carries with it the power to acquire a site therefor, seem to be bottomed upon the proposition that, by implication, power to perform a given act carries with it power to complete such act to the end that the particular subject matter may be a workable whole. With this in mind, and in the light of the declared purposes which have led to the enactment of House Bills Nos. 837 and 932 of the 63rd General Assembly, we believe the conclusion is inescapable that the Legislature used the term "dormitory," in Section 3 of House Bill No. 837, in the sense that there was included in the definition thereof, not only the physical structure, but the land, the building and the necessary equipment to make the entire unit suitable for the purpose for which designed.

Since commencing the preparation of this opinion, we understand that the following question has been presented by the Board of Regents of the Northeast Missouri State College:

"May the state funds appropriated under House Bill No. 837 of the 63rd General Assembly be used for the purchase of building sites, or portions thereof, upon which dormitories are to be erected?"

Section 1 of House Bill No. 837 of the 63rd General Assembly reads, in part, as follows:

"There is hereby appropriated out of the Missouri Post War Reserve Fund the sum of Five Million, Three Hundred Sixty-six Thousand, Seven Hundred Fifty Dollars (\$5,366,750.00) for the purpose of building or purchasing or reconstructing buildings for dormitory buildings with or without dining room facilities as an integral part thereof or dining room facilities alone, or any combination of dormitory and

dining room facilities and one or more social or recreational buildings, or any combination of dormitory, dining room, social and recreational facilities, including land, equipment, and furniture, at the * * * Northeast Missouri State Teachers College, * * *

This, then, seems to be clear legislative authority for the use of state appropriated funds for the purpose of acquiring land to be used as sites for the construction of dormitories.

CONCLUSION

In the premises, we are of the opinion that the expenditure of \$266,661.22 made by Central Missouri State College out of the proceeds of the sale of revenue bonds, as authorized by the provisions of House Bill No. 932 of the 63rd General Assembly, and from other non-state appropriated moneys, for the acquisition of an existing dormitory, together with equipment and furniture, as a part of the program of said college under House Bill No. 837 of the 63rd General Assembly, may be considered as matching funds against the appropriation made to said college under the provisions of House Bill No. 837 of the 63rd General Assembly.

We are further of the opinion that moneys appropriated under House Bill No. 837 of the 63rd General Assembly may be expended for the purchase of building sites, or portions thereof, upon which dormitories are to be erected, provided the educational institutions named in the act comply with the further requirements with respect to matching the state appropriated funds.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Definition of term "other political subdivision" as used in subsection 10, Section 39, Article III, Constitution of 1945.

FILED

5

August 9, 1946

Mr. C. H. Bates
State Collector of Revenue
Jefferson City, Missouri

Mimeo

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Under paragraph 10 of Section 39 of Article 3 of the Constitution, the General Assembly has no power

'To impose a use or sales tax upon the use, purchase, or acquisition of property paid for out of the funds of any county or political subdivision.'

"In the administration of the Sales Tax Act, the question of what is a political subdivision has arisen. In connection with the question on whether or not a city is a political subdivision of the state, may I refer you to the case of Kansas City v. Heal, 122 Mo. 232, 234, in which Division Two of the Missouri Supreme Court said:

'That Kansas City is not a political subdivision of the state, within the meaning of the constitution is equally clear. Subdivision means to divide into smaller parts the same thing or subject-matter, and no city or town in this state is a subdivision thereof except the city of St. Louis, and it be-

came so under sections 20, 22 and 23, article 9, state constitution, and by an act of the legislature in pursuance thereof setting off certain defined boundaries defining the city limits, and conferring upon the city all the rights and privileges possessed by a county.' Cited in Associated Holding Company v. Kelley, et al., 81 S.W. (2d) 64 (3).

"Following the authority of the Neal Case, Supra, this Department has taken the position that the only city in the state which would be entitled to the provisions of the constitutional provision above, is the City of St. Louis. It appears that this will be contested by other cities and it is for that reason that this Department would like to have an official opinion from your Department on the question. We would also appreciate if you would include in your opinion any and all political subdivisions which you think would come under the aforesaid constitutional provision."

The proper construction to be placed upon subsection 10 of Section 59, Article III, of the Constitution of 1945 will be dependent upon the precise meaning to be attributed to the term "other political subdivision" as used therein. As used in the constitutional provision, the term has not been the subject of judicial construction by any of the appellate courts of this state, so we must necessarily arrive at such definition by recourse to the general rules of construction applicable to constitutional provisions.

We note in your letter a reference to a certain opinion of the Supreme Court of Missouri. At the outset, may we say that we are conversant with the Neal case, as well as many other opinions defining the term "political subdivision," but we defer discussion thereof to a later portion of this opinion. We do so for the reason that such definitions were expressed in the course of the construction of two separate provisions of the Constitution of 1875 and not the provision of the Constitution of 1945 now under consideration.

It is a fundamental rule of constitutional construction that the intent of the framers thereof be determined. We quote from State ex inf. v. Ellis, 28 S. W. (2d) 363:

" * * * There is another rule superior to that, which is that the intention of the lawmakers and Constitution makers must be gathered when interpreting an act or a constitutional provision. * * *"

To ascertain such intent, it is proper in certain instances that regard be given to the debates of the Constitutional Convention framing the organic law, to the end that the sense of that body with respect to the particular provision may be discovered. We recognize the rule that such debates are of comparatively limited value, as has been declared by the Supreme Court in *State ex rel. v. Osburn*, 147 S. W. (2d) 1065, wherein the court said:

"In the debates before the Constitutional Convention of 1875 which proposed Section 3, it seems to have been agreed that upon aggregating the votes from the face of the returns the candidate with the highest vote would prima facie be entitled to the office and to enter upon his duties. Any attack upon the returns would have to be made thereafter by a contest before the general assembly. See *Debates of the Missouri Constitutional Convention of 1875* by Loeb and Shoemaker, Vol. IV, p. 428, et seq. We refer to the debates with knowledge of the rule which limits the reliance which may be placed in them. *State ex rel. Heimberger v. Board of Curators*, 268 Mo. 598, 188 S. W. 128."

You will note that even in this case, where the rule of limited reliance upon the Constitutional Convention debates is declared, the court did in fact actually use the record of the proceedings to ascertain the true intent of the provision then under consideration. As declaratory of the rule that it is proper to examine such record, to the end that the true meaning of a provision may be determined, we direct your attention to *Ex Parte Oppenstein*, 233 S. W. 440, wherein the Supreme Court, in Banc, said:

"The constitutional convention, after having put section 3 of article 8 in the form in which it now stands, had before it the question of striking out that section and adopting the following:

"All elections by the people shall be by ballot, but all ballots shall be subject to inspection and examination, in all cases of contested elections and judicial proceedings, under such proceedings, regulations and safeguards as may be provided by law."

"This substitute was rejected by a vote of 42 to 23. Three members were absent. The power to inspect and examine the ballots in 'judicial proceedings' would have been given by this amendment. The convention rejected it.

"It is clear from this that the constitutional convention had before it, in the proposed substitute section, the very question which counsel discuss. This substitute would have expressly given the authority now sought to be exerted. When the convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section."

To the same effect is the following from the opinion in *State ex inf. v. Ellis*; cited supra:

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from *Corpus Juris* above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates."

Judicial recognition of this practice has been affirmatively had in as recent a case as *State ex rel. v. Nordberg*, 193 S. W. (2d) 10 (not yet printed in State Reports).

Another fundamental rule of the construction of Constitutions is that the intent and meaning of a constitutional provision must be determined by reference to the instrument as a whole. We quote from State v. Adkins, 284 Mo. 680:

" * * * It is a fundamental rule of construction of all writings, whether they be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and not to destroy their plain intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle.

"Concerning the construction of constitutions it has been well said that:

"'Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' (1 Story, Constitution, sec. 451.)

* * * * *

"It has been well said by a high authority that:

"The true rule of construction is not to

consider one provision of the Constitu-
tion alone, but to contemplate all, and
therefore to limit one conceded attribute
by those qualifications which naturally
result from other powers granted by that
instrument, so that the whole may be in-
terpreted by the spirit which vivifies,
and not by the letter which killeth."
(Emphasis ours.)

That where necessary to effectuate the true meaning of a constitutional provision, the literal meaning of the words used must give way to such true intent as ascertained from consideration of all of the parts of the instrument, has been reaffirmed in *State ex rel. v. Hackmann*, 229 S. W. 1078, from which we quote:

"There are certain well-understood rules laid down by the courts for the construction of constitutional provisions, and they are the same as those governing legislative enactments. It was said in *State ex rel. v. McGowan*, 138 Mo. loc. cit. 192, 39 S. W. 771, in discussing the general rules of construction of constitutional provisions that--

"The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it."

"In 12 *Corpus Juris*, 700, it is said:

"The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied."

"And also in 12 *Corpus Juris*, 702, it is said:

"If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced

from a consideration of all its parts,
such intent must prevail over the literal
meaning."

With these fundamental rules of construction in mind,
we advert to a consideration of the constitutional provision
of which the term "other political subdivision" forms a part,
together with such other related provisions as may be of
value in determining the true meaning of the one under con-
sideration.

An examination of the transcript of the debates of the
Constitutional Convention which framed the Constitution of
1945 discloses that the provision which now appears as sub-
section 10 of Section 59, Article III, formed a part of
file 19 relating to taxation. The proposal came before the
Convention on the 194th day, at which time the section be-
came the subject of debate as to its meaning and effect.
The following quotations from the transcript of the debates,
found on page 6165, et seq., disclose these statements hav-
ing been made:

"MR. LILL: Mr. President, this amendment,
in the nature of adding a new section to
this file, appears on page eight of the
journal of August 16th and I'll save time
by reading it. "The General Assembly shall
have no power to impose a use or sales tax
upon the use, purchase or other acquisition
of property, by municipalities, counties,
school districts or other political subdivi-
sion of the state."

"I apologize both to the committee and to
this Convention for the late hour of presen-
tation of this purely corrective amendment
which I believe will carry out the thought
of the committee expressed in section 6 of
the file. If you will turn to section 6
you'll find that the committee recommended
as follows: 'All property, real and person-
al, of the state, municipalities, counties
and other political subdivisions, and non-
profit cemeteries, shall be exempt from taxa-
tion;'.
"

"It was our thought at that time that we were
exempting city property or whatever character,
school district property and county property

from the advocacy of any state tax. It has been the policy of this state since its inception not to tax property of cities, municipalities and school districts. Although this file was in the hands of the cities for many months it was only day before yesterday that our attention was called to the fact that under the present statutes in Missouri this sales tax in this state was being applied to those articles purchased by school districts, cities and counties. I am advised in Kansas City it amounts to some where in the neighborhood of thirty-five thousand dollars a year and I imagine it is larger in St. Louis. Now, since this is strictly within the theory advanced by section 6 heretofore approved by this Convention and the amendment speaks for itself, I am merely going to ask that the amendment be adopted.

"ACTING CHAIRMAN: Mr. Allen, this is proposed as a new section?

"MR. ALLEN: Yes. The reason I, Mr. Heege, Judge Hughes and I put it in this form, we believed that it should probably be placed by the phraseology and arrangement committee, probably back in section 6 some where and probably be rephrased so as to conform to the language of section 6 because it all covers the same subject matter and that is the reason we put it in the form of a new section instead of adding it on to either section 12 or 13 or some that we have not yet considered because at the time section 6 was considered this matter had not been called to our attention. I move its adoption.

* * * * *

"MR. COLLIER: Will it relieve the state penitentiary and other penal institutions?

"MR. ALLEN: This section will not. It refers only to municipalities, counties, school districts or other political subdivisions. I don't know that the penitentiary would fall in any of those.

"MR. COLEMAN: How about the eleemosynary institutions of the state?

"MR. ALLEN: Judge, if they are a political subdivision they are exempted under this. If they are either municipalities, counties or other political subdivisions they are; if they are not then it doesn't affect them one way or the other.

"MR. COLEMAN: What I was trying to get at was your intent. Do you just want to leave that open for judicial interpretation as to whether or not they fall within the meaning of the words they used?

"MR. ALLEN: I was only interested in cities, counties and school districts.

* * * * *

"MR. PHILLIPS (OF JACKSON): Mr. Shepley, this proposal of Mr. Allens is much more comprehensive than just exempting municipalities, is it not?

"MR. SHEPLEY: Yes, it would exempt, Mr. Phillips, municipalities, counties, school districts, road districts, sewer districts, drainage districts and if the Convention adopts a proposal that I am going to submit shortly which I gave you a copy of, define what we mean by political subdivisions in article ten, it would include any other authority of government having the power to levy taxes.

* * * * *

"MR. MAYER: Well, of course the General Assembly hasn't been willing to go that far and perhaps that is the reason Mr. Allen is putting it in. We have a provision here that the state may not levy any tax against any municipality or under the property of a municipality. Now, that is in your file. Yet we permit the state, under the construction that has been put on this sales tax law, to levy a tax against the cities because that is what it is when we make the cities pay a sales tax. Now,

if it is good to exempt cities and all political subdivisions from taxes imposed by the Legislature except for state purposes, why shouldn't we exempt them from paying this sales tax?

* * * * *

"MR. ALLEN: Well, it's my understanding - Mr. Shepley has spoken to me, I suppose he has spoken to other members of the Committee about the introduction of an amendment to this file which would describe what is meant by 'political subdivisions' within the meaning of this article when it is finally adopted. I don't recall whether he had that definition in there or not and when that definition comes up for vote by this Convention, I assume the Convention can write into that, any description of the political subdivision which would be appropriate and the description might or might not include drainage districts and special road districts.

* * * * *

"MR. ALLEN: Mr. President, I have been amazed at the trend that the argument on this simple amendment has caused in this Convention. It is a section wholly consistent with the public policy for a hundred years. It is a policy that has been proved by this very Convention itself in section 6 of this file and that is that the state of Missouri shall not impose taxes upon these very political subdivisions that include, that are included in my amendment, to wit, municipalities, counties and other political subdivisions. I didn't include non-profit cemeteries.

"Now, Mr. President, great fears have been expressed here and considerable arguments and much reminiscences have been brought on this floor about what it will do when the only question before us is a simple question of constitutional law. As to whether or not the people of this state want to prevent their state government from imposing a tax upon their municipalities and local governments -- that is pure-

ly and simply the sole question before us. Legislatures can debate what the school funds need. We are not trying to do that here. Legislatures can debate whether or not this fund should be robbed for that fund. As I understand the duty of a constitutional convention it is to write limitations and that is solely and purely what this is -- a limitation upon the power of the Legislature. There is nothing legislative about this section. It is a limitation upon legislatures.

* * * * *

"MR. ALLEN: * * * Now, really, gentlemen, it seems to me you have one simple question here, as constitutional delegates. You either believe that the state of Missouri should impose taxes on these local political subdivisions or you believe that it should not, and if you're not going to accept this let's wipe out section 6 and turn the Legislature loose because one is not consistent with the other and I say to you that at the time we considered this matter the committee did not know that the state of Missouri was attempting to impose a sales tax on the municipalities or counties or it is my opinion the identical provision in section 6 would probably have been voted without a question when that section was adopted except it is thrown in at this late hour and I don't know whether it is the heat or the humidity but this great controversy has arisen over a principle we have already settled. I hope the amendment is adopted.

"PRESIDENT: Question is on the amendment as amended. As many as favor the amendment let it be known by saying 'Aye' ...Opposed? The Chair is in doubt. As many as favor please stand. Opposed? The amendment prevails."

Here, we think, clearly appears an expression of the intent and meaning of this constitutional provision as understood by the members of the Constitutional Convention. However, the Convention did not stop with adopting the amendment, but, for clarification purposes, and to the end that the term "other

political subdivision" might be afforded a clear and distinct definition, further proceedings were had, as disclosed by the following quotations from the transcript of the debates, appearing on pages 5190, 5191 and 5192:

"MR. SHEPLEY: I have an amendment.

"(Amendment submitted and read as follows:)

'Amendment No. 57. Amend File No. 19, page 8, by adding a new section to be designated as Section 15, and reading as follows:

'Section 15. Wherever the term "other political subdivisions" is used in this Article, it is intended to include townships, school districts, road districts, drainage districts, sewer districts, levee districts, and any other public corporation possessing the power to levy taxes.'

"MR. SHEPLEY: I move the adoption of the amendment.

"(Motion was seconded by Mr. Allen.)

"MR. SHEPLEY: * * * I don't believe -- it is certainly broad enough to cover all the various taxing authorities of the state; so far as we can ascertain it does cover the situation. We offer it to you in behalf that it will remove any doubt that would otherwise exist in this section if we did not define specifically what we mean by the word 'other political subdivisions' in article 10.

"In closing, I'll just say this. I have in my hand a list of cases which were noted by Mr. Storckman of our committee when he made the investigation of this matter and to give you briefly the reason for why we found it necessary to define political subdivisions for the purpose of article 10 I'll just give you one or two cases. 'A drainage district is not a political subdivision. In order to be such the unit must have power similar

to a county. A road district is not a political subdivision. A school district is a political subdivision. A school district is not a political subdivision. Another case, the school district is not a political subdivision; a township is a political subdivision; a sewer district and a school district is not a political subdivision.' In other words, there has been some serious doubt as to what is and what is not and certainly some of the things by the Supreme Court, things which the Supreme Court has said are not political subdivisions we want definitely to exclude them.

* * * * *

"PRESIDENT: As many as favor the amendment signify by saying 'Aye' ... Opposed? The ayes have it. The amendment is adopted."

After having adopted this definitive provision, the entire Constitution was referred to the Committee on Phraseology and Arrangement. For some reason not disclosed by the transcript of the proceedings, that committee elected to transpose the arrangement of the Constitution, so that the proposal which had originally been introduced, assigned to File 19 and adopted, and which now appears as subsection 10 of Section 39 of Article III, was placed where it is now found, but the Amendment No. 57 to File-19, which was introduced for the specific purpose of defining the term "other political subdivision" as used in the above mentioned provision, was not carried to Article III but was left in the original File 19, and is now found as Section 15 of Article II of the Constitution of 1945. Said Section 15 of Article II reads as follows:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Here, to us, seems a situation in which the rule that the literal interpretation of the words used in a constitutional provision must not prevail over the true intent and purpose of the framers of the organic law. This seems peculiarly pertinent in the instant discussion because of the historical

affinity between the provisions which we have mentioned. To fail to read into subsection 10 of Section 39 of Article III the definition of the term "other political subdivision," which appears as Section 15 of Article X, when such definition was adopted in the circumstances detailed above, would be to defeat the very purpose of the constitutional provision.

As mentioned previously, we have given attention to the parallel lines of cases which are frequently cited as determinative of the question of whether particular governmental corporations or agencies are or are not political subdivisions. For instance, it has been held, under the provisions of Section 12, Article VI, of the Constitution of 1875, that cities, townships, school districts, levee districts, drainage districts, and such like minor subdivisions of the state, are not within the purview of the phrase "county or other political subdivisions of the state" as used in the constitutional provision. *Wilson v. King's Lake Drainage & Levee Dist.*, 139 S. W. 136, 237 Mo. 39; *Wheat v. Platte City Ben. Assessment Special Road Dist. of Platte County*, 52 S. W. (2d) 856, 330 Mo. 1245, transferred 59 S. W. (2d) 88, 227 Mo. App. 369; *Chilton v. Drainage Dist. No. 8 of Pemiscot County*, 61 S. W. (2d) 744, 332 Mo. 1173, transferred 63 S. W. (2d) 421, 228 Mo. App. 4; *Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County*, Sup., 74 S. W. (2d) 621, transferred, App., 77 S. W. (2d) 477; *Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County*, 102 S. W. (2d) 871, 340 Mo. 811, transferred 111 S. W. (2d) 946, 233 Mo. App. 811; *City of Tarkio v. Loyd*, 78 S. W. 797, 179 Mo. 600; *City of St. Charles v. Hackman*, 34 S. W. 878, 133 Mo. 634; *Kansas City v. Neal*, 26 S. W. 695, 128 Mo. 232; *Village of Grandview, of Jackson County v. McElroy*, 298 S. W. 760, 318 Mo. 135; *Green v. Owen*, 31 S. W. (2d) 1037, 326 Mo. 450, transferred 33 S. W. (2d) 493, 225 Mo. App. 740; *McGill v. City of St. Joseph*, Sup., 31 S. W. (2d) 1058, transferred 38 S. W. (2d) 725, 225 Mo. App. 1033; *Associated Holding Co. v. Kelley*, 31 S. W. (2d) 624, 336 Mo. 251; *City of St. Joseph v. Georgetown Lodge No. 627, I.O.O.F., of St. Joseph*, Sup., 8 S. W. (2d) 979.

To the opposite effect are the cases holding that cities, school districts, etc., are comprehended within the term "the state or to any political subdivision thereof" as used in Section 13 of Article XIV of the Constitution of 1875. *State ex inf. Ellis ex rel. Patterson v. Ferguson*, 65 S. W. (2d) 97, 333 Mo. 1177, certiorari denied *Ferguson v. State of Missouri ex inf. Ellis*, 34 S. Ct. 559, 291 U. S. 682, 78 L. Ed. 1070; *State ex inf. McKittick v. Whittle*, 65 S. W. (2d) 100, 333 Mo. 705, 38 A. L. R. 1099.

However, for the reasons mentioned, we do not believe that these cases are controlling in the present instance because of the rule that the literal meaning of constitutional provisions must not be adhered to when to do so would have the effect of destroying the true intent and meaning of the provision, and for the further reason that the cases mentioned in which the definitions have appeared were of limited application and only involved the construction of the jurisdictional and nepotism constitutional provisions referred to therein.

CONCLUSION

In the premises, we are of the opinion that the proper definition of the term "other political subdivision" as found in subsection 10 of Section 39, Article III, of the Constitution of 1945, is that which is found as Section 15 of Article X of the Constitution of 1945, and that such term as so defined must be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts, and any other public subdivision, public corporation or public quasi-corporation having the power to tax. We, therefore, hold that the use, purchase or acquisition of property paid for out of the funds of any township, city, town, village, school, road, drainage, sewer or levee district, or of any other public subdivision, public corporation or public quasi-corporation having the power to tax, is not subject to a use or sales tax by the State.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

NEWSPAPER:

Entitled to be reinstated under Section 14968, page 859, Laws of Missouri, 1943, by the fulfillment of the requirement of the statute. Publisher defined.

January 4, 1946

FILED

6

Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Dear Sir:

Receipt of your recent request for an opinion addressed to the Honorable W. O. Jackson has been directed to me for my attention. Your request reads as follows:

"Enclosed is the letter about which Mrs. Parish called you today. You will note that Mr. Petroquin wants to know about the legal status of his newspaper, publication of which was suspended when he enlisted in the Navy.

"I will appreciate your opinion on this question."

The letter addressed to you by Mr. Alvin F. Petroquin, and referred to in your request, reads as follows:

"After a suspension of three years I am again publishing the FAIR PLAY at Ste. Genevieve, Missouri.

"I have purchased the entire printing plant of Mr. LeClere Janis and will publish as well as edit the paper.

"At the time I enlisted in the Navy I was editing the paper under a lease from Mr. Janis, but due to my enlistment the paper had to suspend publication. Under House Bill 292, a newspaper can receive its legal publication rights immediately upon reissue provided the paper was suspended because of the

Honorable Wilson Bell - 2

war effort. I sincerely hope that this will hold true as I need the legal publication privileges, as you, a former newspaperman well know.

"After 35 months in service, 18 of which were spent overseas on a Destroyer Escort, I received my Honorable Discharge September 15, 1945.

"My paper will be Democratic in policy and will sell for \$1.00 a year for a time. I am sending you a copy of the first issue published this week.

"Please let me know as soon as possible about my legal status."

The principal question involved and around which our opinion develops concerns whether Mr. Petroquin does or does not qualify as an owner or publisher of the newspaper in question under Section 14968 (referred to by Mr. Petroquin as House Bill 292), page 859, Laws of Missouri, 1943, which section reads as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time: Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of

each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section: Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section. Provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the Secretary of State of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 14970, 14971, 14972, Laws of Missouri, 1941, and Sections 7771, 7772, and 7773, Revised Statutes of Missouri, 1939, are hereby repealed." (Underscoring ours.)

We are informed that at the time the publication of the newspaper "Fair Play" was suspended, Mr. Petroquin was not the owner but rather that he was the lessee of the owner, Mr. LeClere Janis. However, under this situation, we assume the total responsibility of issuing the newspaper and circulating it for sale rested on Mr. Petroquin, so that he would qualify as the publisher of the newspaper.

Webster's New International Unabridged Dictionary, 2nd Edition, defines publisher as,

"One who publishes; esp. one who issues, or causes to be issued, from the press, and offers for sale or circulation, matter printed, engraved, or the like; a person or corporation whose business is the publishing of books, periodicals, music, maps, and the like."

Bouvier's Law Dictionary defines publisher as,

"One who, by himself or his agent, makes a thing publicly known; one engaged in the circulation of books, pamphlets, or other papers,"

which definition is cited with approval in the case of LeRoy v. Jamison, 15 Fed. Cases 373, l. c. 376.

Black's Law Dictionary defines a publisher the same as Bouvier and adds further, "one who publishes, especially one who issues, or causes to be issued, from the press, and offers for sale or circulation, matter printed, engraved, or the like," which is cited with approval in the case of Brokaw v. Cottrell, 114 Neb. 858, 211 N. W. 184, l. c. 187.

It is our notion that Mr. Petrequin is one who issued, or caused to be issued, the newspaper "Fair Play" and offered the same for sale or circulation, and that he thereby qualifies under the definitions herein presented as the publisher of the said newspaper.

Mr. Petrequin states that the newspaper suspended publication three years ago which would place the time of suspension during the year 1942 or during the time of war as required by the statute. He further states that as a result of his induction into the armed forces the newspaper was forced to suspend publication, which further satisfies the requirements of the statute. He is, with the present writing, filing with your office notice of intention to republish the said newspaper. Mr. Petrequin has yet to advise you of the volume and number of the publication, the newspaper's readmission to the post office, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay the stated price for subscription for a definite period of time. Otherwise the requirements of Section 14968, page 859, Laws of Missouri, 1943, supra, have been satisfied.

Honorable Wilson Bell - 5

Conclusion

It is, therefore, the opinion of this department that the newspaper "Fair Play" was forced to suspend publication due to the publisher being inducted into the armed forces of the United States during the war and that said newspaper is therefore entitled to be reinstated at this time with all the benefits under Section 14968, page 859, Laws of Missouri, 1943, upon receipt of information aforementioned, if such newspaper was previously qualified.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

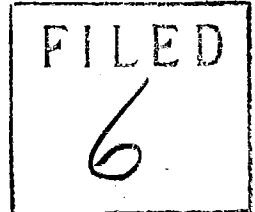
J. E. TAYLOR
Attorney General

JMA:EG

PRIMARY: (1) Notice of primary candidates to
CANDIDATES: be given by Secretary of State
SECRETARY OF STATE: by April 8, 1946.

(2) Last filing date for candidates
for August 1946 primary is April
30, 1946.

January 15, 1946



Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Attention: Mr. P. F. Willis, Chief Clerk.

Dear Sir:

In answer to your request for an official opinion inquiring as to the time that the Secretary of State shall prepare and transmit to the various county clerks the notice designating the offices for which candidates are to be nominated in the 1946 primary and the last day upon which a candidate may file a written declaration as a candidate for the August 1946 primary.

Section 11547, Mo. R. S. A. provides:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

The above section indicates that the date for the August 1946 primary will be August 6, 1946.

Section 11548, Mo. R. S. A., as amended Laws of 1944, Extra Session, page 24, Sec. 1, provides as follows:

"In the year 1944, at least one hundred days before the time of holding such August primary, and each year thereafter at least one hundred twenty days before the time of holding such August primary, the Secretary of State shall prepare and transmit to each county clerk a notice, in writing, designating the office for which candidates are to be nominated at such primary."

We find additional rules for construing statutes under the provisions of Section 655, Mo. R. S. A., which provides as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * * fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded; * * * * *"

Applying the above sections it is determined that the Secretary of State shall prepare and transmit to each county clerk a notice, in writing, designating the office for which candidates are to be nominated at the August 1946 primary to be held August 6, 1946, on or before the 8th day of April, 1946.

Section 11550, Mo. R. S. A., as amended Laws of 1944, Extra Session, page 24, Sec. 1, provides as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, stating his

full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (..... precinct of the town of), or (the precinct of the ward of the city of), or the precinct of township of the county of and State of Missouri, do announce myself a candidate for the office of on the ticket, to be voted for at the primary election to be held on the first Tuesday in August,, and I further declare that if nominated and elected to such office I will qualify.

....."

Construing the above section, the last day for filing as a candidate for the August 1946 primary is the last Tuesday of April preceding such primary. Consulting the calendar we find the last Tuesday of April 1946 to be April 30, 1946.

Conclusion

Therefore, it is the opinion of this department that it is the duty of the Secretary of State to prepare and transmit to each county clerk a notice, in writing, designating the office for which candidates are to be nominated in the August 1946 primary, on or before April 8, 1946.

Hon. Wilson Bell

(4)

It is further our opinion that the last day for filing as a candidate for the August 1946 primary is Tuesday, April 30, 1946.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

ELECTIONS: Declaration of candidacy for nomination as circuit judge of a judicial district composed of but one county should, under Section 11553, R. S. Mo. 1939, be filed with Secretary of State.

March 18, 1946

FILED

6

H-4

Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Attention: P. F. Willis,
Chief Clerk

Dear Sir:

Receipt of your request for an opinion is hereby acknowledged, which reads as follows:

"A question has arisen as to whether the declaration for candidacy for nomination in the case of congressmen, circuit judges or state senators, where their district lies wholly in one county or in the City of St. Louis, should be filed with the Secretary of State or whether it should be filed with the Board of Election Commissioner in St. Louis or the County Clerk in the county in which the district lies.

"We have relied on Section 11553 R. S. Statutes 1939, for our authority in filing the declarations.

"The declarations in question now are as follows: A declaration for Circuit Judge from the 25rd Judicial Circuit comprised of one county, Greene, and a declaration for Circuit Judge from the 25th Judicial Circuit, comprised of one County, Jasper. Should they be filed with the Secretary of State or their respective county clerks."

Section 11553, R. S. Mo. 1939, referred to in your letter, reads as follows:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows:

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state.

"2. For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the city of St. Louis."

Judicial construction of this statute was had in the case of State ex rel. Garesche v. Roach, 167 S. W. 1008, 258 Mo. 541, 1. c. 551, where it is held:

"Even a casual reading of the above section discloses a serious conflict in its provisions, not however in the language used in the section, but in that language when applied to a well-known fact which we judicially notice because embodied in a general law, that is, that the Eighth Judicial Circuit is composed wholly of the city of St. Louis. We must ourselves notice this fact (State v. Pope, 110 Mo. App. 520; Alabama Ins. Co. v. Cobb, 57 Ala. 547; Railroad v. Hyatt, 48 Neb. 161; 1 Chamberlayne, Mod. Ev., sec. 669), and the rules of statutory construction require us to presume, naught else appearing, that the Legislature also held it in mind when the statute was passed. Moreover, the petition herein standing per stipulation as

and for the alternative writ, so charges and on demurrer the truth of all matters well pleaded in the petition is admitted.

"The above section requires by specifically naming these offices that all candidates for 'state officers, representatives in congress, courts of appeals and circuit judges' shall file their declarations of candidacy 'in the office of the Secretary of State.' (All italics are ours.) It further provides generally that all declarations for nomination 'for officers to be voted for wholly within one county, or in the city of St. Louis,' shall be filed in the office of the county clerk of such county, or in the office of the election commissioners of the city of St. Louis. Applying the rule of construction which requires the general provisions of a statute to yield to special provisions, where there is a conflict and where the general expressions in one part of a statute are inconsistent with the more specific provisions in another part of the statute (Rodgers v. United States, 135 U. S. 83; State ex rel. v. Hotel Co., 9 Mo. App. 1. c. 453), we see that candidates for circuit judges are required by a specific provision naming this office to file their declarations with the Secretary of State. We may gather from the whole law a fairly consistent legislative intent to divide the officers into classes, pursuant to which classification (which was as consistent as the facts will permit) those officers who ordinarily are elected from more than one county are required to file declarations with the Secretary of State, while those who ordinarily are elected from a single county are required to file declarations with the county clerk. The only provision which is in any way inconsistent with this view of the legislative intent, is that relating to a state senator whose district is composed of but one county. This legislative intent, save and except that such

inconsistency as to place of filing declarations of candidacy of certain candidates for State senator still inheres, is accentuated by a reference to section 5860 of the same act. Here candidates for nomination for the office of circuit judge are specifically and again by naming the office, required to pay the fee required to the treasurer of the State central committee, while again county officers are put into another class and are required to pay such fee to the treasurer of the county central committee.

"It was early announced as rule of statutory construction in this State that effect shall if possible be given to the whole and every part of a statute. (Riddick v. Walsh, 15 Mo. 519; Macke v. Byrd, 131 Mo. 682; Scott v. Royston, 223 Mo. 568; State ex rel. v. Ryan, 232 Mo. 77; State ex rel. v. Harter, 188 Mo. 516; Strottman v. Railroad, 211 Mo. 227.) This rule is well-nigh universal in all jurisdictions and is without exception, save that the interpretation reached by the application of the rule should be reasonable and not out of accord with the legislative intent. (36 Cyc. 1128, and cases cited.)

"Unless we say that candidates for nomination for circuit judge in the Eighth Judicial Circuit must file their declarations of candidacy with the Secretary of State and not with the Board of Election Commissioners of the city of St. Louis, we are compelled to excise as meaningless from section 5862 the words 'circuit judges.' For we cannot reach this conclusion till we cut out and cast away these words from clause one of the above section. It is persuasive but concededly not in any manner decisive, that still another general classification was in the legislative mind. That is, that county officers (and city officers elected at general elections) were put in one class and all other officers (again, except a

State senator from a single county) were placed in another class.

"These considerations induce us, while conceding the existence of some argument for the other view, to believe that the rules of statutory construction and the great weight of reason lies with the view that declarations of candidacy for nomination for circuit judge of the Eighth Judicial Circuit should be filed with the Secretary of State, and so we hold." (Last underscoring ours.)

The same legal principles are applicable to both of the cases presented by your letter and we believe this case to be controlling.

Conclusion

It is, therefore, the opinion of this department that under Section 11583, W. S. L. 1939, the declarations of candidacy for nomination as Circuit Judge of the 23rd and 28th Judicial Districts, each composed of but one county, should be filed with the Secretary of State.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

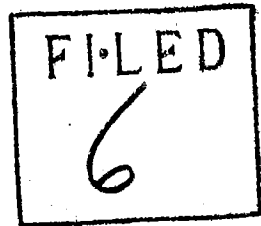
APPROVED:

J. M. TAYLOR
Attorney General

JLA:EG

OFFICERS: Office of magistrate is constitutional office
and persons aspiring to such office should file
MAGISTRATES: declarations with county clerk.

April 20, 1946



Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your letter requesting an official opinion, which reads as follows:

"Complying with your suggestion of today, I am attaching hereto a letter from A. M. Harlan, an Attorney of Sedalia which is self-explanatory. Will you kindly furnish this office with an opinion as to whether the Office of Magistrate in the County of Pettis, with a population of 33,000 is a state office or a county office."

In connection with your request we also quote the letter sent to you by Mr. A. M. Harlan of Sedalia, Missouri, which reads as follows:

"I have announced through the County Clerk, as a candidate for Judge of the newly constituted Magistrate Court, and I am in a quandary as to whether or not I have made announcement through the proper source.

"There has been some discussion as to whether this office is to be placed in the category of a State or County office.

"If this question has been passed upon, will you please advise me, and if not would you request an opinion from the Attorney General.

"Please reply as promptly as is convenient."

Section 18, Article V, Constitution of 1945, creates the magistrate courts and provides as follows:

"Magistrate Courts--Probate Judges--Number of Magistrates--Salaries.--There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law."

This section supersedes Section 37, Article VI, Constitution of 1875, which reads as follows:

"Justices of the peace.--In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

The General Assembly is given the power to provide for the administration of magistrate courts in Section 21, Article V, Constitution of 1945, which reads as follows:

"Magistrate Courts--Administration.--The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

Pursuant to this grant of power the General Assembly adopted Senate Bill 207. Section 7 of Senate Bill 207 provides for the transfer of duties and authority from justices of the peace to magistrates and, in part, reads as follows:

"* * * All justices of the peace of this state, at the expiration of their present terms of office, shall immediately thereafter deliver to

the clerk of the magistrate court of their county or district in which their courtroom is located all dockets, records, books, papers and documents appertaining to their offices, or relating to any suit, matter or controversy committed to them in their official capacity, and the magistrate for any county or district upon entering upon the duties of his office shall be entitled to such books, papers, and records in and appertaining to any office of the justice of peace then, or thereafter, becoming vacant in said county or district."

Under this section the magistrates assuming the duties of their office will take possession of all dockets, records, books, papers and documents appertaining to the offices of justices of the peace, and will take over the duties of the justices of the peace upon the expiration of their present terms of office.

In the case of State ex rel. Rowan v. Pollock, 310 Mo. 620, 276 S.W. 20, there was involved the question of the jurisdiction of the justice of the peace. The court, in defining the office of justice of the peace, said the following, at S.W. 1.c. 21:

"The office of justice of the peace is a constitutional office, and is provided for by section 37 of article 6 of our Constitution thus:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

In the case of Wilson v. Walters, 112 Pac. (2d) 964, the term "constitutional officers" was defined as follows:

"* * * Constitutional officers are persons who duly occupy by appointment or election constitutional offices. A constitutional office as distinguished from a municipal or legislative office is one created or provided for by the Constitution * * * * *

It is, therefore, our notion that the office of magistrate, which has been created by our present Constitution, is a constitutional office. And, by the same token, magistrates would be constitutional officers.

The jurisdiction given each magistrate is coextensive with his county. Section 19, Article V, Constitution of 1945, provides as follows:

"Magistrate Districts--Jurisdiction of District Magistrates--Organized Magistrate Courts.--After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. Each of such magistrates shall have jurisdiction coextensive with the county, and the magistrates may organize into a court or courts with divisions."

Section 8 of Senate Bill 207 defines the jurisdiction of magistrates as follows:

"Each magistrate shall have jurisdiction coextensive with his county and the magistrates may organize into a court or courts with divisions."

Although the office of magistrate is a constitutional office, we are constrained to say that, between a state office and a county office, the office of magistrate more closely resembles a county office in view of the fact that the jurisdiction of each magistrate is only coextensive with his county.

Section 11553, R. S. Mo. 1939, provides for the manner in which a person who aspires to public office shall file his declaration, and reads as follows:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows:

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state.

"2. For officers to be voted for wholly within one county or in the city of St. Louis, in the

office of the county clerk of such county
or the office of the election commissioners
of the city of St. Louis."

As previously decided, the office of magistrate is a constitutional office, and persons seeking such office will be voted for wholly within one county. Consequently, their declarations should be filed in the office of the county clerk, in compliance with Paragraph 2, of Section 11553, supra.

Conclusion

It is, therefore, the opinion of this department that the office of magistrate is a constitutional office and persons seeking such office will be voted for wholly within one county. Consequently, such persons should file their declarations in the office of the county clerk in their respective counties in compliance with Section 11553, R. S. Mo. 1939.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:CP

CONSTITUTIONAL LAW: Sections 18 and 25, Constitution of 1945;
Senate Bill 207.

PROBATE JUDGES:

MAGISTRATES:

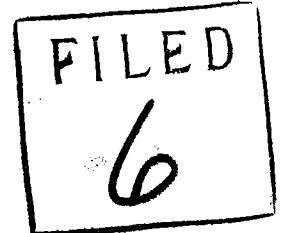
In counties of 30,000 or less, persons seeking office of probate judge and magistrate must qualify for probate judge. There is no conflict as to qualifications for magistrates by the Constitution and Senate Bill 207.

April 23, 1946

FILED

6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri



Dear Sir:

We acknowledge receipt of your letter requesting an official opinion of this department, which reads as follows:

"I would like to have your opinion upon the following: Crawford county is a county of less than 30,000 inhabitants. Section 18 of article 5 of the new constitution provides that in a county of less than 30,000 inhabitants the probate judge shall be judge of the magistrate court. Section 25 of article 5 of the new constitution prescribes the qualifications for the probate judge and also the magistrate judge. As I construe it the probate judge must be a licensed attorney at law, except that the probate judge now in office may succeed himself as probate judge without being so licensed; and that a person is qualified to be a magistrate judge if he is a licensed attorney, or if he has heretofore been a justice of the peace in this state for at least four years.

"It would appear that in a county under 30,000 that the magistrate judge and probate judge must be one and the same person, yet different qualifications are prescribed.

"At the present time we have had one man file for the office of magistrate judge, and one man file for judge of the probate court. Both

of these men are justices of the peace and have been for four years, but neither is licensed to practice law. It would appear to me that there is a direct conflict between the constitution and Senate Bill 207, which also sets out the qualifications of a magistrate judge. Will you please advise me as to whether or not in a county of this size the probate judge and magistrate judge must be one and the same person, or can there be two separate offices, and please advise me as to the qualifications that each must have, or if one man must be both, what his qualifications must be."

In your request you have propounded certain questions pertaining to the offices of probate judge and judge of the magistrate court in counties with a population of 30,000 or less.

The first question that we shall endeavor to answer is whether in such counties the probate judge and the magistrate must be one and the same person.

We direct your attention to Section 18, Article V, of the Constitution of 1945, which provides for the magistrate courts, and which, in part, reads as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. * * * * *

The effect of this section is to combine the offices of probate judge and magistrate in counties with 30,000 inhabitants or less, and to invest one person with the duty and authority to perform the functions of both offices. That one person shall be the probate judge. In this regard the wording of the Constitution is clear and unambiguous and there is no room for a different interpretation. Your conclusion regarding this question is correct.

The second question that logically follows is, what qualifications must such person possess to be eligible for the combined office of probate judge and magistrate.

Section 25, Article V, of the Constitution of 1945, provides for the qualifications for probate judges and magistrates, and, in part, reads as follows:

"* * * Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are not justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

Since we have concluded that in counties with a population of 30,000 or less the offices of probate judge and magistrate are not separate but are combined, and that the probate judge shall perform the functions of both offices, it is, therefore, necessary that any person seeking the combined office of probate judge and magistrate must qualify for the office of probate judge.

Section 25, supra, sets out the age, voting and residence qualifications necessary to hold the office of probate judge and further, requires that probate judges must be licensed to practice law. The exception to this qualification is that probate judges now in office, (meaning on the date the Constitution was adopted, February 27, 1945), may succeed themselves as probate judges without being so licensed.

You have stated that in your county two men, who are presently the justices of the peace, have filed for office; one has filed for the office of judge of the probate court and the other has filed for judge of the magistrate court. In view of the foregoing, we conclude that there is only one office to file for and that is judge of the probate court, who also will be the magistrate. Neither man can qualify for the office of probate judge because he is not licensed to practice law in this state, or is not presently the incumbent probate judge.

In answering these first two questions we have adhered to certain principles of constitutional construction and interpretation in construing the relevant provisions of the Constitution. The following appropriate rules appear in Vol. 16 of C.J.S.:

Section 16, page 51:

"A constitution should be construed so as to ascertain and give effect to the intent and

purpose of the framers and the people who adopted it."

This rule is pronounced in *Graves v. Purcell, et al.*, 337 Mo. 574, 85 S.W. (2d) 543, 1. c. 547.

Section 14, page 49:

"A constitution should be construed as fundamental law and should be interpreted in such a manner as to carry out the broad general principles of government stated therein."

Section 17, page 55:

"Unless the meaning of the terms employed is not clear, questions as to the wisdom, expediency, or justice of a constitutional provision play no part in the construction thereof."

In *Stockburger v. Jordan*, 76 Pac. (2d) 671, 10 Calif. (2d) 636, there was involved the construction of a constitutional provision relating to the people's power of referendum. The Pacific citation, 677, expressed the following:

"* * * We have nothing to do with the policy of the law as expressed in this section of the Constitution, and can neither approve nor condemn the same. Our duty begins and ends with the interpretation of the language so used in the Constitution, and with ascertaining the meaning thereof. This we have attempted to do, regardless of the reasons which may have prompted those responsible for the enactment of this provision of the Constitution."

The two men who have filed and are now justices of the peace, and have been for four years, may feel that they are qualified for the respective offices to which they aspire. In this connection, the rule of constitutional construction that a constitutional provision cannot be evaded because it works a hardship has been observed.

In *State v. Missouri Workmen's Compensation Commission*, 2 S.W. (2d) 796, 318 Mo. 1004, the question of when the Workmen's Compensation Act went into effect was involved. In ruling on the constitutional question, the court said at S.W. 1.c. 802:

"Nor can we change the Constitution by mere force of our opinion, just because some hardships may be occasioned by following the Constitution. * * * * *

It might appear that there is some inconsistency existing between Section 18, supra, of our Constitution, which provides that in counties of 30,000 or less the probate judge shall also be the magistrate, and Section 25, supra, which provides for separate qualifications for probate judge and magistrate. In other words, an incumbent probate judge not licensed to practice law can succeed himself and, under Section 18, supra, can also be the magistrate, though it does not appear that he possesses the qualifications for magistrate as set out in Section 25, supra.

In this regard, we quote the following from 11 Am. Jur., Section 53, pages 661 and 662:

"In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision, and if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.

"It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. * * * * *

In connection with the above quotation we cite the case of Jones v. Williams, 121 Tex. 94, 45 S.W. (2d) 130, 79 A.L.R. 983, where there was involved the problem of the Legislature having the power to release persons from payment of taxes. In ruling on certain constitutional provisions the court stated the following, at S.W. 1. c. 137:

"* * * The rule is that a Constitution is to be construed as a whole, and 'effect is to be

given, if possible to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. * * * It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. Every provision should be construed, where possible, to give effect to every other provision. * * * * *

Although the problem has not been specifically presented in your request, we would like to take this opportunity to briefly discuss the question whether a probate judge now in office can succeed himself as probate judge and also be the judge of the magistrate court, when he is not licensed to practice law. An opinion was rendered by this office on this very question, to the Honorable Thomas G. Woolsey, Prosecuting Attorney of Cooper County. We quote the words of Mr. W. O. Jackson, Assistant Attorney General, as follows:

"The Constitution provides for probate courts and magistrate courts. It also provides that in counties having a population of 30,000 inhabitants or less the probate judge shall be the magistrate. It further provides that probate judges and magistrates shall be lawyers, except that probate judges now in office may succeed themselves if they are not lawyers and that persons who have previously been justices of the peace in this state for at least four years, shall be eligible for the office of magistrate. At first glance it would seem that there may be a conflict in these provisions, for in one place the provision requires magistrates, with the one exception that the persons who have served as justices of the peace for at least four years, must be lawyers. However, in construing the pro-

visions of the Constitution, we must consider them all together, and the same section of the Constitution which prescribed the qualifications for judges of the probate courts and for magistrates also permits a judge of the probate court, who is now in office and who is not licensed to practice law, to succeed himself. To hold that the Constitution authorizes a probate judge, who is not a lawyer, to succeed himself to the office of probate judge, but that the provision of the Constitution relating to magistrates forbids him to be a magistrate, when the Constitution further specifically provides that the judge of the probate court in counties having a population of 30,000 inhabitants or less, shall be the magistrate, would be the height of absurdity and would place an interpretation upon the Constitution which would convict the framers of the Constitution of gross carelessness.

"Inasmuch as the Constitution specifically declares that in counties having a population of 30,000 inhabitants or less, the judge of the probate court shall be the magistrate, and further provides that a probate judge who is not a lawyer may succeed himself as probate judge, it necessarily follows that he may also be the magistrate."

The remaining question before us is to determine if there is a conflict existing between Senate Bill 207 and the Constitution. Section 3 of Senate Bill 207 provides for the qualifications for judge of the magistrate court and, in part, reads as follows:

"Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be

eligible to the office of magistrate without
being licensed to practice law. * * * * *

(Emphasis ours.)

We have concluded that in counties of 30,000 inhabitants the probate judge serves as judge of the magistrate court, and have construed Section 25, supra, to mean that in such counties a probate judge may succeed himself as probate judge and be judge of the magistrate court though he is not licensed to practice law. The same is clearly provided in the underscored portion of Section 3 of Senate Bill 207, supra.

The remaining portion of Section 3, supra, pertaining to the qualifications for magistrate, would only apply in such counties where the office of judge of the magistrate court is separate, as in counties with a population over 30,000, or in counties with a population of 30,000 or less, where additional magistrate courts have been created by order of the circuit court.

Section 6 of Senate Bill 207 provides as follows:

"In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court and his failure or refusal to do so shall constitute a vacancy in both the office of probate judge and the office of judge of the magistrate court."

Under this section anyone holding the office of probate judge who is licensed to practice law, a fortiori would qualify as judge of the magistrate court. A person holding the office of probate judge may succeed himself although not licensed to practice law. The fact that he was holding the office on the date the Constitution was adopted qualifies him for the office of probate judge. And, since the Constitution says that in counties of 30,000 inhabitants or less, the probate judge shall be the magistrate, a person who qualifies for probate judge a fortiori qualifies for judge of the magistrate court.

Conclusion

It is, therefore, the opinion of this department that under our present Constitution in counties of 30,000 inhabitants or less, the office of probate judge and judge of the magistrate court shall be held by one person, who shall be the probate judge; that in such counties any person seeking the combined office of probate judge

Hon. G. C. Beckham

(9)

and judge of the magistrate court must qualify for the office of probate judge. There is no conflict between our present Constitution and Senate Bill 207 so far as the qualifications for judge of the magistrate court are concerned.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

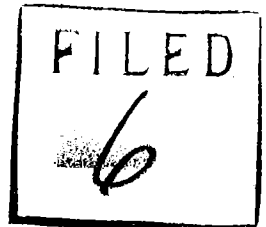
APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: Name of candidate should not be printed on official ballots when such candidate dies before primary election.

July 19, 1946

FILED 6



Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter with the letter attached from the County Clerk of Stone County that submitted facts upon which an official opinion was requested and which reads as follows:

"Mr. J. W. Ellis, Probate Judge of Stone County, had filed as a candidate for nomination to succeed himself,

"Mr. Ellis died June 15th, 1946, The copy for printing the sample ballots had gone to the printer before his death, so his name appears on the sample Ballots.

"The question has been discussed pro and con here as to whether we have the authority to place his name on the official Ballots or leave it off.

"I do not find anything in the Statutes in regard to this question, will appreciate the favor if you will give what information you can as to what should be done in regard to dropping the name or leaving it to be put on the official Ballots."

On the facts submitted, the question propounded for our opinion is whether or not the name of a candidate for public office should be printed on the official ballot for the coming primary election when the candidate has died before the time for printing the official ballots. In connection with this question your attention is directed to certain sections of the statutes pertaining to primary elections.

Section 11550, Laws of Missouri 1944, ex. sess. provides, in part, as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceeding such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * *"
(Emphasis ours)

Apparently, Mr. Ellis had complied with this section in submitting his declaration of candidacy within the proper time and in the correct form.

Section 11557, R.S.Mo. 1939, provides for an official ballot to be printed, and reads as follows:

"An official ballot shall be printed and provided for use at each voting precinct in the form provided herein. The names of all the candidates for the respective offices, who shall have filed declaration papers as in this article prescribed, shall be printed thereon."

In construing this Section and Section 11550, supra, we are primarily concerned with the meaning of the word "candidate". That word has been defined as follows in 12 C.J.3., p. 1110:

"* * * In its ordinary, popular meaning, which is also its legal meaning, as signifying one who is seeking an office, one who is offered, or who offers himself, for the same, * * *"

For all practical purposes it can hardly be said that Mr. Ellis is now a person who aspires to public office or who offers himself for the same, although at one time he may have done so. Consequently, under the above definition he is not now a candidate for the office to which he had originally aspired.

Under Section 11550, supra, it is our notion that for a person to have his name printed on any official ballot of a primary election he must not only have filed his declaration for candidacy within the time and in the manner prescribed, but he must presently be a candidate. Also, under Section 11557, supra, the names printed on an official ballot for a primary election must belong to persons who are presently candidates.

It is a cardinal rule of statutory construction that we ascertain the lawmakers intent from the words used, and to apply to the language a plain and rational meaning. Artophone Corporation v. Coale, 133 S.W.(2d) 343, 345 Mo. 344. This rule must be observed in construing those statutes relating to the question. In State ex rel. St. Louis Public Service Company v. Public Service Commission, 34 S.W. (2d) 486, 326 Mo. 1169, the court said at S.W. l.c. 489, "that a statute should not be construed in a way to make it unreasonable when it can be given a reasonable construction."

In State ex rel. Neu v. Waschter, 58 S.W.(2d) 971, the right of a candidate in a primary election to withdraw was involved. In construing the particular statute, in connection with the question, the court said at l.c. 974-975:

"In our opinion, a construction of this statute which would make it mean that a candidacy once declared by the filing of papers can never be recalled, and that the name of the candidate must be printed on the ballot, is so violent and unreasonable that it ought not to be adopted if any other construction is possible. It would mean the names of deceased declarants, those who had moved out of the city or state and admittedly become ineligible, or those who would refuse to continue in the race if nominated, nevertheless must be voted upon by the people. And in cases where a deceased or ineligible declarant received the highest number of votes it would nullify the whole primary election. 46 S.J. Sec. 267, p. 207; Sheridan v. St. Louis, 183 Mo. 25, 81 S.W. 1082, 2 Ann. Cas. 480."

* * * * *

"* * * And when the statute, section 10441, provides the names of candidates 'who so declare' shall be printed on the official primary ballot, it is equivalent to saying the names of those who do not so declare shall not be printed. The very purpose of the law would be defeated if the statute were held to mean the name of every declarant must be published as a candidate, regardless of intervening eventualities such as death, withdrawal, etc."

In the instant case, to say that a dead man's name must be printed on the official ballot for the primary election would defeat the purpose of the statute requiring the names of all candidates to be printed on the official ballot, and would be an unreasonable construction of the statute.

In further support of our construction placed on Sections 11550 and 11557, supra, in which we concluded that only the names of those persons who are presently candidates for office should be printed on the official ballots for a primary election, we cite the case of *State ex rel. Baneroft v. Frear*, 144 Wis. 79, 128 N.W. 1068, in which was involved the outcome of a primary election for the Office of Attorney General where one of the candidates had died before the election. In construing a certain section of the State Primary Law the court said at N.W. 1.c. 1071:

"(a) Section 18, Subd. 1, Primary Law, provides: 'The person receiving the greatest number of votes at a primary as the candidate of a party for an office, shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election.' We do not think that a dead man is a 'person' within the meaning of this statute. The word 'person' as it is ordinarily used means a living human being. It is so defined in Webster's and in Johnson's and in the Century Dictionaries. It is so defined by the courts. *Sawyers v. Mackie*, 149 Mass. 269, 21 N.E. 307; *U.S. v. Crook*, 25 Fed. Cas. 695, 697; *Morton v. Telegraph Co.*, 130 N.C. 299, 41 S.E. 484; *Caldwell v. Wallace* (Ala.) 4 Stew. & P. 282, 285; *Morrill v. Lovett*, 95 Me. 165, 169, 49 Atl. 666, 667, 56 L.R.A. 634. In the latter case it is said; 'The natural and obvious signification of the word "person" in a statute is a living human being.' Both the Maine and Massachusetts courts significantly say that when statutes refer to one who is dead they speak of him as a 'deceased person' or a 'person deceased.' It would seem ridiculous to place any other interpretation on the statute under consideration, because it expressly provides that the person receiving the greatest number of votes at the primary shall be the candidate, and that his name shall be placed on the election ballot. The Legislature did not in-

tend that, if a dead man received a plurality of the votes cast, he became the candidate of the party, and that his name must go upon the ballot, to be voted for at the ensuing general election. * * *

In this case the court said that it did not think that a dead man is a "person" within the meaning of the statute, and by analogy we do not believe that a dead man is a "candidate" within the meaning of the statutes herein referred to.

CONCLUSION

Therefore, it is the opinion of this department, that under Section 11550, Laws of Missouri, 1944, Ex. Sess., and Section 11557, R.S.Mo. 1939, only the names of existing candidates, who have filed their declaration of candidacy in the form and manner prescribed by law, and within the proper time, should be printed on the official ballots of any primary election.

Respectfully submitted,

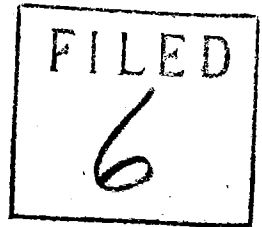
RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: Secretary of State in canvassing of votes for members of congress, state senators and representatives and judges of the circuit courts does not follow procedure laid down in Section 18, Article IV of the Constitution of Missouri.

November 27, 1946



Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"Our office has been questioned as to whether Section 18, Article IV of the New Constitution was applicable to the counting of the election returns which we will start on in a few days.

"As it specifically names the elective officials only, we were of the opinion that it did not apply to this election.

"However, knowing it is best to be on the safe side in such matters, may we ask that you give us your opinion."

Section 18, Article IV of the Constitution of Missouri 1945 referred to in your request provides as follows:

"The returns of every election for governor, lieutenant governor, secretary of state, state auditor, state treasurer and attorney general shall be sealed and transmitted by the returning officers to the secretary of state, who shall appoint two disinterested judges of a court of record of the state, and the three shall constitute a board of state canvassers. The board shall meet at the State Capitol on the second Tuesday of December next after the election and forthwith open and canvass the returns of the votes cast and from the face thereof ascertain and proclaim the result of

November 27, 1946

the election. The persons having the highest number of votes for the respective offices shall be declared elected, and if two or more persons have an equal and the highest number of votes for the same office, at its next regular session the general assembly, by joint vote and without delay, shall choose one of such persons for the office."

The duty imposed upon the secretary of state in regard to canvassing of votes cast for certain offices in this state is set forth in Sections 11463 and 11466 R. S. Mo. 1939.

Section 11463 provides as follows:

"The clerks of the several courts to whom a transcript of the votes is directed shall, within two days after the time limited for the examination of the polls, deliver to the nearest postoffice on the most direct route to the seat of government, addressed to the secretary of state, a fair abstract of the votes given in their respective counties, by precincts, for members of congress, governor, lieutenant-governor, state senators and representatives, judges of the supreme court, judges of the St. Louis and Kansas City courts of appeals, judges of the circuit courts, secretary of state, state auditor, state treasurer, attorney-general, railroad and warehouse commissioners and superintendent of public schools. Such abstracts shall be enclosed in strong envelopes, closely sealed, which shall in no case be opened until the day fixed for the counting of such votes as hereinafter provided, and the said envelopes shall be indorsed by the clerk:

"Returns of an election held in the county of _____, on the _____ day of _____, A. D. 19 ____, for the offices of _____, etc."

Section 11466 provides as follows:

"Within fifty days after such general election, and as much sooner as all the returns

November 27, 1946

shall have been made, the secretary of state, in the presence of the governor, shall proceed to open the returns and cast up the votes given for all candidates for any office, except governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney-general, railroad and warehouse commissioners and superintendent of public schools, and shall give to the persons having the highest number of votes for members of congress, from each district, certificates of their election, under his hand, with the seal of the state affixed thereto, and shall certify to the governor the names of the candidates having received the highest number of votes for the offices of judges of the supreme court, circuit courts and St. Louis and Kansas City courts of appeals." (Underscoring ours)

We may take judicial notice of the fact that at the general election held November 5, 1946, none of the officers mentioned in Section 18, Article IV, supra, were elected because all of said offices were filled at the general election held in 1944, and said offices will not be voted on again until the general election in 1948 (Section 2, Article 5, Constitution of Missouri 1875; Section 17, Article IV, Constitution of Missouri 1945; Section 11458, R. S. Mo. 1939).

Therefore, the only offices, the votes for which must be canvassed by the secretary of state this year are members of congress, state senators and representatives and judges of the circuit courts. In canvassing these returns the question as asked in your request is, is the secretary of state required to appoint two disinterested judges of a court of record of the state who, together with the secretary of the state, shall constitute a board of state canvassers as provided for in Section 18, Article IV of the Constitution of Missouri 1945, supra.

Section 18, Article IV, of the Constitution is plain in its requirement that such procedure must be followed in canvassing the returns of an election for governor, lieutenant-governor, secretary of state, state auditor, state treasurer and attorney general, but mentions no other officers. It is a cardinal rule in construing a constitution that words are to be given their natural, obvious or ordinary meaning, (State ex rel. Kansas City v. Orear, 277 Mo. 303, 210 S. W. 392; 16 C.J.S. 57) and there is no occasion for construction,

November 27, 1946

if the language is plain and definite (State v. Thompson, 331 Mo. 321, 53 S. W. (2d) 273).

While the method of canvassing the votes of those officers specifically mentioned in Section 18, Article IV of the Constitution imposes a definite duty upon the canvassing officials mentioned therein and such provision is self-executing (16 C.J.S. 111) still as to those officers not mentioned in said constitutional provision, the Legislature possesses and may exercise all legislative power to enact statutes relating to the canvassing of the returns of the election of such officers, subject only to the limitations or prohibitions imposed by the constitution (State ex rel. Crutcher v. Koeln 332, Mo. 1299, 61 S. W. (2d) 750).

By Section 11466 R. S. Mo. 1939, supra the General Assembly has provided that the secretary of state in the presence of the governor shall open the returns and cast up the votes for all the candidates mentioned except those votes for the offices mentioned in Section 18, Article IV of the Constitution. Therefore, we believe it is apparent that the canvassing requirements set forth in Section 18, Article IV, do not in any way relate to the casting up of the returns of the elections for members of congress, state senators and representatives and judges of the circuit courts.

CONCLUSION

It is, therefore, the opinion of this department that the requirement, in Section 18, Article IV, of the Constitution of Missouri 1945 that the Secretary of State shall appoint two disinterested judges of a court of record of the state and the three shall constitute a board of state canvassers, does not apply to the canvassing by the secretary of state in the presence of the governor of the returns of the elections of members of congress, state senators and representatives and judges of the circuit courts.

Very truly yours

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:MA

COUNTY BUDGET LAW: Appropriation for county hospitals comes out of class five of Budget Law.

2 P. G. Smith

FILED

July 10, 1946

7/16

Mr. Davis Benning
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The Pike County Hospital of Pike County, Missouri is operated and maintained under the Provisions of Article 4 Chapter 126, Revised Statutes of Missouri, 1939, which is entitled 'Establishing and maintaining County Hospitals.'

"The Board of Trustees of the Pike County Hospital have advised the County Court of Pike County that the funds and income of said hospital are insufficient to maintain and operate it for the balance of this year and have requested the County Court to make an appropriation out of its general funds for the support, maintenance and operation of said hospital and are making this request under Section 15201, Revised Statutes of Missouri, 1939.

"I would appreciate very much if you would give me your opinion as to which classification under the County Budget Law, the County Court may make this appropriation."

Replying to same, Section 15201, R.S. Mo. 1939, provides as follows:

"In counties exercising the rights conferred by this article, the county court may appropriate each year, in addition to tax for hospital fund hereinbefore provided for, not exceeding five (5) per cent of its general fund for the improvement and maintenance of any public hospital so established."

Section 10911, Session Acts of 1941, page 650, sets out the classification of proposed expenditures that the County Court shall make and the order in which they shall be made.

Section 10914, Laws of Missouri 1941, page 652, requires the County Court to show the estimated expenditures for the year by classes, and provides six classes.

Your question is which one of these six classifications embraces the appropriation by your County Court of funds to your county hospital under authority of Section 15201, above set forth.

By a mere reading of the first four classes it is easily determinable that such an appropriation does not come under any of them, because the appropriation is not for the care of paupers who are insane in state hospitals, nor is it for the expense of conducting circuit court or holding elections, nor is it for the repair or construction of roads and bridges, nor is it for the pay or salaries of officers and office expense.

Class 5 thereof authorizes the County Court to "transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses."

The word "contingent" is defined by Webster's New International Dictionary, Unabridged, 1940, among other definitions, to mean "liable, but not certain, to occur; possible." As used in law, it gives this definition thereof: "Dependent for effect on something that may or may not occur."

The writer has read all of the cases that he has found in the Missouri Revised Statutes Annotated bearing on the construction of the County Budget Law, among them being the following: Layne Western Company v. Buchanan County, 85 Fed. (2d)

343; Gill v. Buchanan County, 142 S.W. (2d) 665, 546 Mo. 599; Graves v. Purcell, 85 S.W. (2d) 543, 337 Mo. 574; Bash v. Truman, 75 S.W. (2d) 840, 335 Mo. 1077; Rinehart v. Howell, 153 S.W. (2d) 381, 348 Mo. 421; State ex inf. Walsh v. Thatcher, 102 S.W. (2d) 937, 340 Mo. 865; Traub v. Buchanan County, 108 S.W. (2d) 340, 341 Mo. 727; Mo.-Kan. Chemical Co. v. New Madrid County, 139 S.W. (2d) 457, 345 Mo. 1167; Carter Waters Corp. v. Buchanan County, 129 S.W. (2d) 914.

From such investigation as we have made, we have not been able to find where the courts in Missouri have thrown much light on the classification which should be given to the various items mentioned in the County Budget Act. However, in Words and Phrases, Volume 8, Permanent Edition, page 124, a number of cases are cited under the term "Contingent Expense," among them being People v. Village of Yonkers, N.Y., 39 Barb. 266, 272, holding a contingent expense must be deemed to be an expense depending on some future uncertain event.

The Ohio case of State v. Kurtz, 144 N.E. 120, 124, 110 Ohio St. 332, holds, according to the above authority, that "expenses certified to the county auditor by the county board of education are to be considered as 'contingent expenses' if made for a legitimate school purpose."

Said authority also cites Brannin v. Sweet Grass County, 293 P. 970, 972, 88 Mont. 412, as holding, "Contingent expenses necessarily incurred for use and benefit of county which are made proper county charges by virtue of Rev. Codes 1921, Sec. 4952, Subd. 8, are defined to mean happening of unforeseen causes or subject to unforeseen conditions, or such as are possible or liable but not certain to occur."

It would seem that your county hospital has, in the past, been able to operate without the appropriation being made by the County Court, to which your request here refers, but that at this time your county hospital is not able to operate properly without the appropriation mentioned in Section 15201, supra. So far as we are advised, there is no certainty that your county hospital will be able to function properly hereafter without such an appropriation by the County Court, or will not be able to satisfactorily operate without such an appropriation. In other words, such an appropriation may or may not be necessary in future years, or, as is said in Webster's Dictionary, above, that need is

Mr. Davis Bonning

-4-

"liable, but not certain, to occur," which would seem to place your appropriation properly within class 5 of the County Budget Law, that is, that this appropriation is to be used as "contingent" expenses and for the payment thereof.

Conclusion,

It is our opinion that where the County Court makes an appropriation of not exceeding five per cent of its general funds for the improvement and maintenance of a public county hospital established under Section 15201, R.S. Mo. 1939, that the classification under the County Budget Law, to which said appropriation should go, is class 5 thereof.

Yours very truly,

DRAKE WATSON
Assistant Attorney General

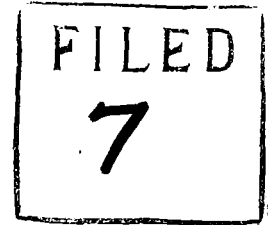
APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

CITIES: Sales tax should be collected on sales of elec-
SALES TAX: trical current and water by a municipally owned
FRANCHISE: light and water plant. In Re: Franchises of
telephone and other public utility companies.

October 29, 1946



Honorable E. F. Bertram
Representative of Scotland County
Memphis, Missouri

Dear Sir:

This is to acknowledge receipt of yours of recent date wherein you requested an official opinion from this department which is as follows:

"I should like to have you render an opinion on the two following questions:

"Is a city required to collect a Sales Tax upon the current and the water from a municipally owned light and water plant?

"If the contract or franchise of a telephone company or other public utility company has expired, can same be renewed or extended by the passage of an ordinance by the City Council, or is the vote of the people required?"

I note from your request that you ask that it reach you by October 24. Due to the fact that we have so many requests, it has been impossible for us to finish this opinion in that time, and I hope you will pardon us for the delay.

Taking up the first part of your request, relating to the application of the Missouri Sales Tax to the sales of current and water sold by a municipally owned light and water plant, we refer to pertinent portions of the Sales Tax Act as re-enacted in House Bill 652 by the 63rd General Assembly. The Missouri Sales Tax Act was originally enacted in 1935, and has been re-enacted biennially thereafter without any material changes in so far as the subject of your inquiry is concerned.

Since the adoption of the new Constitution, a number of political subdivisions have made inquiries as to whether or not they are subject to the Sales Tax Act on account of the provisions of Sub-Section 10 of Section 39 of Article 3 of the Constitution of 1945, which provides as follows:

"The general assembly shall not have power:
'To impose a use or sales tax upon the use,
purchase or acquisition of property paid
for out of the funds of any county or
other political subdivision.'"

This department has written an opinion holding that political subdivisions, referred to in said Sub-Section 10, include cities, towns and villages, and that the sales tax may not be imposed on sales of tangible personal property to such political subdivisions where the price therefor is paid out of funds of such cities, towns or villages. Therefore, if the sales tax is imposed on such political subdivisions, then under the foregoing provisions of the Constitution, it could not be collected. It will be noted, however, that the foregoing provision of the Constitution does not prohibit the general assembly from providing that such political subdivisions shall collect the sales tax when they are engaged in any business required to collect such tax under the Sales Tax Act.

The Sales Tax Act defines certain businesses which are included within its provisions. In Sub-Section (a) of Section 11407 of the Act, the term "person" is defined as follows:

"'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department), estate, trust, business trust, receiver or trustee appointed by the State or Federal Court, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

It will be noted from the aforesaid definition of the term "person" that a municipal corporation is included within the Act.

Sub-Section (c) of said Section 11407 defines the term "business" as follows:

"'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this article. The isolated

or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this article."

Sub-Section (e) of said Section 11407 defines the term "purchaser" as follows:

"The word 'purchaser' whenever used in this Act means a person who purchases tangible personal property or to whom are rendered services, receipts from which are taxable under this Act."

Sub-Section (f) of said Section 11407 defines the term "seller" as follows:

"The word 'seller' when used in this article means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under Section 11408."

Sub-Section (g) of said Section 11407 defines the term "retail sale" as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace: * * *

"(2) Sales of electricity, electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

The levying section of the Sales Tax Act is found at Section 11408, and the portion of it which levies a tax on sales of electrical current, water, etc., is found in Sub-Section (c) of said Section 11408. A part of said Section 11408 and said Sub-Section (c) reads as follows:

"Section 11408. From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid: * * *

"(c) A tax equivalent to two (2%) per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

The Sales Tax Act was before the Missouri Supreme Court in the case of School District of Kansas City vs. Smith, State Auditor, et al., 111 S.W. (2d) 167. In that case, the status of the purchaser and the relation of the seller to the state was considered by the court, and at l.c. 168 the court said:

"* * * The purchaser is the taxpayer, and seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax. * * *"

Therefore, if the municipality is engaged in the business of selling light and water, it is not the taxpayer, but it is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax from the purchaser of light and water who is the taxpayer.

In your request, referring to franchises of telephone or other public utilities, we find that the statutes applicable to telephone company franchises are different from those applicable to electrical light and water plants and other public utilities. In fact, we find that these statutes are applicable to different cities which have water, light and power plants.

The statute relating to franchises of telephone companies is Section 5326 R. S. Mo. 1939, which reads as follows:

"Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters: Provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

The telephone companies included in this section are set out in Section 5321 R. S. Mo. 1939, and it reads in part as follows:

"Any number of persons, not less than five, being subscribers to the stock of any contemplated telephone or magnetic telegraph company, may be formed into a corporation for the purpose of constructing, owning, operating and maintaining lines of telephone or magnetic telegraph, upon complying with the following requirements: * * *"

The question of whether or not the provisions of what is now Section 5321 R. S. Mo. 1939 included only the persons named in that section was before the Kansas city Court of Appeals in the case of the City of Plattsburg vs. the Peoples' Telephone Company, 88 Mo. App. 307-313, wherein the court said:

"As above observed, the statutes of this State (section 1251, article 6, Revised Statutes 1899) by general provision give the right to corporations organized under that article to erect telephone poles in the streets of the cities of the State. But that statute does not deny the right to individuals, or to corporations organized outside this State. * * *"

From this opinion, it would seem that the provisions of Section 5326, supra, would be applicable to all companies who desired to obtain a franchise from the city. The Missouri Supreme Court, in the case of State ex inf. McKittrick, Attorney General, ex rel. City of Lebanon vs. Missouri Standard Telephone Company, 85 S.W. (2d) 613, in construing what is now Section 5326 R. S. Mo. 1939 said at l. c. 617:

"* * * The statute, by its express terms, is a legislative grant to telegraph and telephone companies organized under the provisions of the Missouri statutes of the right 'to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters.' But the grant of authority conferred by the statute is limited by the terms of the proviso which prescribes that, where a telegraph or telephone company desires 'to place their wires, poles and other fixtures in any city, they shall

first obtain consent from said city through the municipal authorities thereof.' * * *"

At 1. c. 618, the court further said:

" * * * We think it is well settled by the decided weight of authority that, where a city is authorized by statute to give or to withhold its consent to the use of its streets by a public utility, upon giving its consent, the city can impose reasonable conditions upon the exercise of the right or franchise granted, and that among the conditions that it can rightfully impose is one limiting the duration of the franchise. * * *"

This would indicate that the municipal authorities of a city may, by ordinance, grant authority to telephone companies to set their poles, piers, abutments, wires and other fixtures along the streets of the city for the purpose of operating a telephone system.

On the question of franchises for other public utilities such as gas works, electrical works, waterworks, etc., we find that the 63rd General Assembly, by House Bill 461, which was approved on January 25, 1946, enacted a law relating to franchises to such utilities by cities of the fourth class. Section 7178 of this Act provides in part as follows:

" * * * The board of aldermen shall have the right, also, to erect, maintain and operate gas works, electric light works, or light works of any other kind or name, and to erect lamp posts, electric light poles, or any other apparatus of appliances necessary to light the streets, avenues, alleys or other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and to regulate the same, and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire by purchase, donation or condemnation suitable grounds within or without the city upon which to erect such works, and the right of way to and from such works, and also the right of way for laying gas pipes, electric wires under or above the grounds, and erecting posts and poles and such other apparatus and appliances, as may be necessary for the efficient operation of

such works: Provided, that the board of aldermen may, in its discretion, grant the right to any person, persons or corporation, to erect such works and lay the pipe, wires, and erect the posts, poles and other necessary apparatus and appliances therefor, upon such terms as may be prescribed by ordinance: Provided further, that such rights to any such person, persons or corporation shall not extend for a longer time than twenty years, and shall not be granted nor renewed, unless by consent of a majority of the qualified voters of the city, voting at an election held for such purpose: Provided still further, that nothing herein contained shall be so construed as to prevent the board of aldermen from contracting with any person, persons or corporation for furnishing the city with gas or electric lights in cities where franchises have already been granted, and where gas or electric light plants already exist, without a vote of the people; * * *"

This Act seems to apply especially to authorities of cities of the fourth class to enter into contracts with gas works, electric light or light works.

CONCLUSION

(1) It is therefore the opinion of this department that cities which own and operate municipal water and light plants should collect the Missouri Sales Tax on sales of electrical current of water to their customers.

(2) It is the opinion of this department that telephone franchises may be granted by municipal authorities and such authority does not have to be approved by the voters of the municipality.

(3) It is the opinion of this department that in cities of the fourth class the board of aldermen of such cities may grant franchises to operate gas works, electrical light works or light works, provided such franchises do not extend for a longer time than twenty years and provided that the consent of a majority of the qualified voters of the city vote at an election on such proposition is obtained.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

~~COUNTY COURTS:~~ Use of seal, and fee of Sheriff and deputy for attending such court.

August 26, 1946.

FILED

10

827

Hon. Gordon R. Boyer,
Prosecuting Attorney
Lamar, Missouri.

Dear Mr. Boyer:

This is in reply to yours of recent date, wherein you submit a request for an official opinion as follows:

"Under the new constitution the County Court is no longer a court of record. It is, therefore, my opinion that they do not use a seal and it also is my opinion that the sheriff is not entitled to a \$3.00 allowance for opening court.

"I wish you would advise me definitely on this so that I may advise the court of this when they meet next Monday."

Section 1991, R. S. Mo. 1939, provides that each court of record shall procure and keep a seal.

Under Section 36, of Article 6 of the old Constitution, and by Section 1990, R. S. Mo. 1939, county courts were made courts of record.

However, under the new Constitution Sec. 7, Article 6, and by Senate Bill 229 of the 63rd General Assembly, county courts are no longer courts of record. Since the powers and duties of county courts are limited and prescribed by the constitution and statute, and as they are no longer courts of record, then such courts would not be required to have a seal.

On the question of the authority of the sheriff to charge a per diem for himself or his deputy for attending the county court, we find that the authority for such charge, if any, is in Section 13411, R. S. Mo. 1939, which allows the sheriff or his deputy the sum of \$3.00 per day for attendance upon courts of record. Under the new Constitution the county court is no longer a court of record and, therefore, the services of the sheriff or his deputy in attending such court would not be within the pro-

visions of said Section 13411, supra.

In order for an officer to have authority to charge a fee for his services, he must be able to point to the statute authorizing such charge. (Nodaway County v. Kidder, 129 S.W. (2d) 857, 344 Mo. 795.). As there is no statute authorizing the payment to the sheriff for attendance on courts not of record, then the sheriff would not be authorized to make such charge and the county court would not be authorized to pay same.

CONCLUSION

It is, therefore, the opinion of this department that county courts, under the new Constitution and statutes enacted in support thereof, are not courts of record and are not required to have a seal.

It is also the opinion of this department that the per diem of \$3.00 allowed to sheriffs and their deputies for attendance upon courts of record would not be permitted to be paid to the sheriff or his deputy for attendance upon county courts.

Respectfully submitted,

TYRE W. BURTON,
Assistant Attorney-General

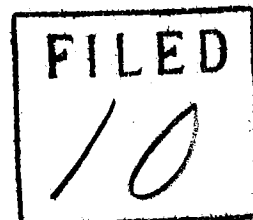
TWB/LD

APPROVED:

J. E. TAYLOR,
Attorney-General.

CONSERVATION COMMISSION: The State of Missouri owns beds of navi-
WATERS : gable waters, and the riparian only owns
: to low water mark of navigable waters.

September 3, 1946.



Conservation Commission
State of Missouri,
Jefferson City, Missouri.

Attention Mr. I. T. Bode, Director.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion, which reads in part:

"We have under consideration a proposal to establish a state migratory waterfowl refuge on some low water sandbars and mud flats along a short stretch of the Missouri River between Boone and Moniteau Counties. On the Boone County side this area extends from the center of Section 11, Township 47-N, Range 14-W, to the southern border of Section 3, Township 46-N, Range 13-W.

"Following our established procedure of setting up all areas with the consent of the landowner or legal representative thereof, we would like to determine who owns or has jurisdiction over the type of lands described above.

"The lands and water with which we are concerned would include the river channel between the lines of visible vegetation. The land area alone would cover only that portion which is exposed between the ordinary high-water and low-water levels. No lands above the high water levels are involved.

"Specifically, who owns or has jurisdiction over the river channel between the lines of visible vegetation--the federal government, the state, the county, or the adjoining riparian landowners?"

The law is well established that title to beds of navigable waters passed to the states when admitted to the union.

In *Hecker v. Bleish*, 3 S.W. (2d) 1008, 1.c. 1015-16, in so holding the court said:

"* * * The same author, in section 166 of the said text, states the following as the generally accepted rule; * * *

"In 29 Cyc. 355, it is said:

"'No title to the soil under navigable waters was conferred by the Constitution upon the federal government, so far as the original states were concerned, but the title remained in the respective states. But before a state is admitted and while it is a territory, the federal government is vested with the title to the lands under water. This title, however, except as conveyed before the admission of the state, is relinquished to the state upon its admission into the Union.'

"The rule or doctrine just stated finds ample support in the decisions of the Federal Supreme Court in *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L.Ed. 565, *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224, and *Mobile Transp. Co. v. Mobile*, 187 U.S. 479, 23 S. Ct. 170, 47 L.Ed. 266.

"In *Gould on the Law of Waters* (3rd Ed.) Sec. 39, p. 94, it is said:

"'The United States is the source of title to lands within its limits which are not within the boundaries of the states, and the new states, being admitted into the Union upon an equal footing with the original states, become entitled to all the rights and privileges possessed by the latter. They have the same rights, sovereignty, and jurisdiction, as to the soil of navigable waters, as the older states; and neither the right of the United States to the public lands, nor the power conferred upon Congress to make laws and regulations for the sale and disposition thereof, enables the general government to grant the shores and bed of such waters within the limits of a new state after its admission into the Union.'

"The later decisions of this court appear no longer to follow the doctrine which seems to have been announced in the earlier cases of *Adams v. St. Louis*, and *Benson v. Morrow*, *supra*, but appear to hold to the rule or doctrine announced by the Federal Supreme Court in the cases cited *supra*, namely, that title to the bed or soil under the navigable waters within the boundaries of the state passed from the United States to the state of Missouri upon its admission into the Union, and when islands spring up or form upon the soil or river bed beneath the waters of navigable rivers within the boundaries of the state, or lands are made by the recession of the waters of such navigable rivers, such lands are part of the public domain, and the state, by right of sovereignty, has the power and authority to transfer and grant its title there- to to the respective counties of the state in which such lands are located, to be held by such counties for school purposes, under the act of the General Assembly of 1895. *McBaine v. Johnson*, 155 Mo. 191, 202, 55 S.W. 1031; *Moore v. Farmer*, 156 Mo. 33, 49, 56 S.W. 493, 79 Am. St. Rep. 504; *State ex rel. v. Longfellow*, 169 Mo. 109, 129, 69 S.W. 374; *Frank v. Goddin*, 193 Mo. 390, 395, 91 S.W. 1057, 112 Am. St. Rep. 493."

In *Martin et al. v. The Lessee of Waddell*, 10 L. Ed. 997, 1.c. 1013, the court said:

"For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.* * *"

Also in *United States v. Utah*, 75 L. Ed. 844, 1.c. 849, 283 U.S. 64, the court said:

"* * * In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within Utah passed to that state when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States. * * *."

A riparian owner of land in the State of Missouri owns land only to the low-water mark and not to the middle of the thread of the navigable stream.

In *Frank v. Goddin*, 193 Mo. 390, l.c. 394, the court, in so holding, said:

"* * * In the first place, whatever be the common law or the civil law, each State of this Union may settle for itself the title to lands formed by accretions within its boundaries. (*Barney v. Keokuk*, 94 U.S. 324; *St. Louis v. Rutz*, 138 U.S. 226).

"In the second place, in Missouri, the riparian owner does not own to the middle of the thread of a navigable river, ad filum medium aquae (*Benson v. Morrow*, 61 Mo. 345), but only owns to low water mark. (*Cooley v. Golden*, 117 Mo. 33; *State ex rel. v. Longfellow*, 169 Mo. 109.)**."

See also *Peterson v. City of St. Joseph*, 156 S.W. (2d) 691, l.c. 694, wherein the court held that a riparian owners along the Missouri River owned to the water's edge, and may claim accretions to their lands. In so holding, the court said:

"'Accretions must, as a rule, in their formation preserve uninterrupted contiguity.' Therefore, 'alluvion cannot become an accretion to land by extending itself until it meets the land, except in cases where the title to the land extends to the center of the stream. For example, if the process is such that an island first arises from the water, and afterwards becomes connected to the land by the addition of accretions to it, the title to the island will not vest in the riparian owner of the mainland.' 1 R.C.L. pp. 232, 233.

"In *Moore v. Farmer*, 156 Mo. 33, l.c. 43, 56 S.W. 493, 496, 79 Am. St. Rep. 504, the following instruction was, in effect, approved. 'The court instructs that the Missouri river is a navigable stream, and that riparian owners along said river own to the water's edge only; their line expanding as the waters recede and accretions form to the land, and contracting as the waters encroach upon and wash away their land; the line always remaining at the water's edge. But the formation or reliction must be gradual and imperceptible, and must be made to the contiguous land so as to change the position of the water's edge or margin. And if

is is shown by the preponderance of the testimony in the case that the land in controversy first appeared as an island or formation of soil, sediment, or other substances out in the midst of the Missouri river, to which accretions were formed from the deposit of soil and other substances by the waters of said river, until the banks of said island or formation extending northward united with the main bank of the river, or was separated therefrom by a slough or depression only, then such lands are not an accretion to the main bank of the river * * *."

In a recent decision, *Hartvedt v. Harpst*, 173 S.W. (2d) 65, 1.c. 69, the court, in holding that a riparian proprietor on a navigable stream owns to the low-water mark, said:

"It is well settled in this state * * * that a riparian proprietor on a navigable stream only owns to the water's edge.' *Cox v. Arnold*, 129 Mo. 337, 341, 31 S.W. 592, 593, 50 Am. St. Rep. 450. 'Upon navigable streams (as is the Missouri river) the riparian owner has title to the river bank and no further. The river bank may be figured at and to low-water mark.' *Doebbeling v. Hall*, 310 Mo. 204, 215, 274 S.W. 1049, 41 A.L.R. 382. We take judicial notice of the fact that the Missouri River is a navigable stream. *Wright Lumber Company v. Ripley County*, 270 Mo. 121, 131, 192 S.W. 996; *Heiberger v. Missouri & Kansas Telephone Company*, 133 Mo. App. 452, 458, 113 S.W. 730.* * *"

CONCLUSION

Therefore, it is the opinion of this department that, in view of the foregoing decisions, the State of Missouri owns the beds to navigable waters and the riparian land owner owns to the low-water mark of navigable waters.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General

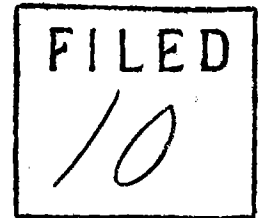
APPROVED:

J. E. TAYLOR
Attorney General

ARH/LD

CONSTITUTIONAL LAW: IN RE: Section 4, Article IV, Constitution of
OFFICERS: 1945 does not permit the Governor to
SHERIFF: fill vacancy in office of sheriff. Such
vacancy filled by County Court.

September 16, 1946



Honorable Paul Boone
Prosecuting Attorney, Ozark County
Gainesville, Missouri

Dear Mr. Boone:

This will acknowledge receipt of your letter requesting an official opinion of this department, which reads:

"I desire your opinion in connection with a vacancy in the office of Sheriff of Ozark County, created by the resignation of the Sheriff elected at the last general election.

"Section 4 of Article IV, of the Constitution of 1945, provides, that the governor shall fill all vacancies in public offices unless otherwise provided by law.

"Section 13143, R. S. Mo. 1939, provides that in case of vacancy in office of Sheriff, the same shall be filled by the county court.

"Section 13143 does not seem to be inconsistent with Section 4, of Article IV, of the Constitution of 1945, however since there has been some controversy about the matter, please give me your opinion as to whether the appointment should be made by the County Court, or by the Governor."

In connection with your question, regarding the filling of a vacancy in the office of sheriff, we must look to the appropriate constitutional provision. Article IV, Section 4, of the Constitution of 1945 provides:

"Power of Appointment to Fill Vacancies--Tenure of Appointees.-- The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

The above section, in substance, is the same as Article V, Section 11 of the Constitution of 1875, which provides:

"Vacancies in office--Governor may fill

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

In the case of State ex rel. Wayland v. Herring, 106 S. W. 984, 208 Mo. 708, the Supreme Court said that Section 11, Article V, supra, was intended to prevent vacancies in office and to provide a method for filling them when no other provision is made by law. At S. W. l.c. 988, the following appears:

"* * *The framers of our Constitution, when they drew Section 11, art. 5, thereof, were considering vacancies in public offices. They foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for these vacancies as far as possible, in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law. * * *"

Section 11509, R. S. Mo. 1939, provides for filling vacancies in state and county offices which were originally filled by election by the people, and reads as follows:

"Vacancies, how filled

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such

term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date." (underscoring in first part of section ours.)

In the case of State ex rel. Wayland v. Herring, supra, the constitutionality of Section 7028, R. S. Mo. 1899, which is the same as Section 11509, supra, was attacked as being in conflict with Section 11, Article V, of the Constitution of 1875, supra. In ruling on the question and declaring Section 7028 to be constitutional, the Supreme Court said, at S. W. 1.c. 989:

"* * * There has been a uniform legislative construction of section 11 of article 5 of the Constitution since its adoption. That construction has been that the Legislature could not only provide who should make appointments to fill vacancies in office, but might also prescribe the term of the persons so appointed to fill vacancies, whether made by the Governor or some other officer or body. While courts are not bound to follow legislative construction yet when such construction has been contemporaneous and long continued, it is entitled to great weight. Ry. v. Brick Co., 85 Mo.. loc. cit. 332; State ex rel. v. Stonestreet, 99 Mo. 361, 12 S. W. 895; Amer. & Eng. Enc. of Law, vol. 6, p. 931." (underscoring ours.)

* * * * *

Such is the construction which has been given to Section 11, Article V of the Constitution of 1875, which, in substance, is the same as Section 4, Article IV of the 1945 Constitution.

The effect of a later Constitution adopting the words and context of a provision in a former Constitution, which had been judicially construed, was stated by the Supreme Court en banc in the case of Ludlow-Saylor Wire Co. v. Wollbrinck, 205 S. W. 196, 275 Mo. 339, at S. W. 1.c. 199:

* * * * *

"The rule is firmly settled that the

adoption in a later Constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning.
* * *

The Legislature has provided for filling a vacancy in the office of sheriff. Section 13143, R. S. Mo. 1939, in part, provides:

"Vacancy in office, how filled--private person may execute process, when

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified;
* * *Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

While it is true that Section 11, Article IX of the Constitution of 1875 provided that a vacancy in the office of sheriff would be filled by the County Court, it does not necessarily follow that Section 13143, supra, is unconstitutional and, therefore, inoperative

because the provisions of Section 11, Article IX of the 1875 Constitution have been omitted from the Constitution of 1945. Unless Section 13143, supra, is inconsistent with our present Constitution it shall remain in full force and effect.

Regarding the repeal of existing statutes by the adoption of a new Constitution, the rule is stated in Volume 16, C.J.S., Section 43a at page 91:

"While a new constitution is, by its very nature intended to supersede a prior constitution, as shown above in Sec. 42, it is not intended to supersede the entire body of statutory law. To the extent that existing statutes are not expressly or impliedly repealed by the constitution, or by constitutional amendments, they remain in full force and effect. * * *"

Also on page 92 of Volume 16, the following appears:

"* * *It is a generally accepted rule, however, that repeals by implication are not favored; in fact there is a presumption against such a repeal. A constitutional provision does not repeal a statute on the ground of repugnance or inconsistency unless they are clearly repugnant and so inconsistent that they cannot have concurrent operation, and, in order to effect a repeal by revision, a constitutional provision must be a revision of the entire subject matter so that the intention that the provision will be a substitute for the prior statute is apparent. * * *"

In the case of State ex rel. Aquamsi Land Co. v. Hostetter et al., 79 S. W.(2d) 463, 336 Mo. 391, a judgment rendered by the Cape Girardeau Court of Common Pleas was attacked on the ground that at the time the judgment was rendered that Court was no longer in existence. It was contended that prior to 1924 the Cape Girardeau Court of Common Pleas was provided for by Section 5 of the old Schedule of the Constitution of 1875, but that in 1924 the adoption of Constitutional amendment 21, entitled "Schedule" made no mention of the Court of Common Pleas and repealed the old Schedule and since no provision for the continued existence of that Court was included in the newly adopted Schedule it, therefore, became extinct. There was also a provision in the new Schedule which said that all laws, not inconsistent with the Constitution so amended,

would continue in force until amended or repealed. The Supreme Court of Missouri in ruling on the question said, at S. W. l.c. 468:

"The plain intent of the foregoing is that the provisions of this amendment should become operative only to the extent that new provisions of fundamental law submitted therewith were adopted and embodied in the Constitution itself. Nowhere in this amendment do we find an expression that any provision of the old schedule was repealed unless in conflict with the purposes and provisions stated in the new schedule, and no such conflict appears. Neither do we find therein any provision that the authorization of certain courts of common pleas appearing in section 5 of the old schedule was repealed. As for the other twenty amendments proposed, the only one with which this authorization in section 5 of the old schedule could have been in conflict or superfluous was proposed Amendment No. 7 relating to the judicial department, and this amendment was defeated. No new fundamental law affecting the prior existing constitutional authorization of the class of common pleas courts within which the Cape Girardeau court of common pleas falls having been embodied in the Constitution itself, and the entire subject having been omitted in Amendment No. 21, it would seem that this provision of the old schedule is not within the scope of the new schedule, and was not affected thereby. Repeals by implication are not favored (Cooley's Constitutional Limitations (8 Ed.) p. 316; Black on Interpretation of Laws (2 Ed.) Sec. 107, p. 351; 12 C.J. p. 710, note 54; Endlich on Interpretation of Statutes, Sec. 210, p. 280). At page 281 in the authority last cited it is said: 'A rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.'

The same authority at page 731, holds that the same presumption against unnecessary change of law exists in the construction of a constitutional provision. Also see Tackett v. Vogler, 85 Mo. 480, 483."

* * * * *

A careful study of Sections 11509 and 13143, fails to disclose any conflict with any provision of the new Constitution. Section 4, Article IV of the new Constitution says that the Governor shall fill all vacancies in public office unless otherwise provided by law, and the Legislature has enacted a law for filling a vacancy in the office of sheriff which provides that such vacancy shall be filled by the County Court. In the absence of any inconsistency with the Constitution, that law remains operative and in full force and effect as is provided in Section 2, of the Schedule of the Constitution of 1945, which, in part, provides:

"Effect on Existing Laws.--All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. * * *"

CONCLUSION

In view of the foregoing, it is the opinion of this department that a vacancy in the office of sheriff shall be filled by the County Court as provided by Section 13143, R. S. Mo. 1939, which does not conflict with any provision of the Constitution of 1945.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:mv

COUNTY COURTS: Use of seal

*Supplement to
Opinion No. 10 dated
8/26/46*

FILED

10

October 24, 1946

10/28

Honorable Gordon R. Boyer
Prosecuting Attorney
Lamar, Missouri

Dear Mr. Boyer:

Since rendering to you the opinion under date of August 26, 1946, on the question of whether or not the county court is required to have a seal, since under the Constitution and Senate Bill 229 of the 63rd General Assembly it is no longer considered as a court of record, it has been called to the attention of this department that there are a number of statutes which require the seal of the county court to be attached to documents, and for that reason the county court should continue to have a seal. Therefore, General Taylor has decided to re-consider the aforesaid opinion in the light of these suggestions.

Some of the statutes in which a seal is required, and which stand unrepealed, are as follows:

Section 8 of Senate Bill 483, enacted by the 63rd General Assembly and approved July 12, 1946, requires the clerk of the county court to give a bond, one of the conditions of which is that he will deliver to his successor * * * *, seals, * * * * * belonging to his office.

Section 10 of said bill provides in part as follows:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; * * *"

Section 12 of said bill provides as follows:

"The clerk of the county court shall have power and is authorized to administer oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office, and incident to the powers and proceedings of the county court of which he is clerk; and shall have power and authority to administer

oaths and affirmations, and to take and certify depositions within the respective counties in all cases where oaths or affirmations are required by law to be administered. And, when required, he shall affix thereto his jurat and the seal of the county court of which he is clerk."

Section 1852 R. S. Mo. 1939 requires that bonds of certain officers, some of which may be filed in the office of the county clerk, may be sued upon when such bonds are duly certified by the seal of the officer and whose custody the bond is required by law to be kept.

Section 1854 R. S. Mo. 1939 is to the same effect and provides that bonds filed in certain offices, when duly certified and attested with the seal of the officer to whom, by law, the custody of the same is committed, shall be used in evidence.

Under the Laws of the United States on the subject of authentication of records, etc., we find this provision on page 3985 of the Revised Statutes of Missouri, 1939:

"* * * The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form, and the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Section 13364 R. S. Mo. 1939, as amended by House Bill 743 of the 63rd General Assembly, requires that a notary public's bond, after having been recorded in the office of the county clerk, shall be filed in the office of the Secretary of State and may be sued upon. While this section does specifically provide for the seal of the county court to be attached thereto, it has been a practice that such seal be attached.

Probably there are other statutes requiring the seal of the county court on records and documents certified by the

clerk of that court; however the statutes which we have specifically referred to herein contemplate that the seal of the county court be used.. These statutes have not been repealed or modified by the 63rd General Assembly.

Section 2 of the Schedule of the 1945 Constitution provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly.* * *"

We do not think the statutes herein before referred to which require the clerk of the county court to use the seal of the county court in attestation of records and documents under his custody, would be inconsistent with the Constitution of 1945. While Senate Bill 229 of the 63rd General Assembly eliminates "county courts" from Section 1990 R. S. Mo. 1939 which provides what courts shall be courts of record, nevertheless, this act does not go so far as to say that county courts, even though they are not courts of records, may not have a seal.

Section 1991 R. S. Mo. 1939 does provide that courts of record have a seal, but we find no statute which prohibits a court not of record from having a seal. In view of the fact that the unrepealed statute hereinbefore referred to, relating to the duties of the county clerk in using the county court seal when certifying records, have not been repealed or amended, then we think that in order to give those statutes a full meaning, the county court would still be required to keep the seal. The rule of statutory construction which would be applicable here is found in the case of Davis Construction Co., Inc., vs. State Highway Commission, 141 S.W. (2d) 214, which rule, at l. c. 221, is as follows:

"It is a well settled rule that all parts of a statute must, if possible, be reconciled and all given meaning and effect, and that a party cannot take out isolated sections and disregard other and equally important sections of the statute."

CONCLUSION

Applying the foregoing rule of statutory construction and reasoning, it is the opinion of this department that the county courts, even though they may not be courts of record under the statutes of this state, still in order for the clerk of that

Hon. Gordon R. Boyer

(4)

court to perform his duties under the statutes, such courts should have a seal. It is further the opinion of this department that the opinion hereinbefore referred to directed to you under date of August 26, 1946, should be and is hereby amended and modified to the extent that county courts should have and use a seal.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

STATE BOARD OF OPTOMETRY: Without authority to limit the statutory qualification-period of registered apprentice to five years by regulation.

November 8, 1946

FILED

10

12/17

Dr. J. R. Bockhorst, Secretary
Missouri State Board of Optometry
4032A W. Florissant Avenue
St. Louis 7, Missouri

Dear Sir:

We hereby acknowledge receipt of your recent request for an opinion, which reads as follows:

"The State Board of Optometry will greatly appreciate your office giving the Board an opinion in connection with the following matter:

"Pursuant to Section 10115 of the Revised Statutes of Missouri, 1939, a person 'who has studied for three years as a registered apprentice under an optometrist registered under the laws of this state' and who possesses the other prescribed qualifications, may be examined by the State Board 'to determine his fitness to receive a Certificate of Registration as a Registered Optometrist.' In 1943, the Missouri General Assembly amended Section 10115 so that it now provides that said 'three years of study as a registered apprentice shall have been started prior to October 1, 1943,' (see Laws of Missouri, 1943, Pages 973 to 976). The intention of the Legislature in so amending the Optometric Law was to prevent the possibility of a person's becoming a Registered Optometrist by serving as an apprentice, it being the feeling of the

Legislature and of the State Board of Optometry that all persons practicing Optometry today should have formal schooling in optometry.

"In order to further put into effect the intention of the Legislature, as expressed in the Optometry Law, the State Board of Optometry would like to issue a ruling so as to compel the men who are presently serving as apprentices to either become Optometrists or to stop practicing as apprentices. The Board believes that it has the power by virtue of Section 10125 which reads as follows:

"The State Board of Optometry may adopt reasonable rules and regulations relating to the enforcement of the provisions of this Chapter."

"The rule which the State Board of Optometry would like to adopt would read as follows:

"Pursuant to Missouri Law, a registered apprentice who has studied under an Optometrist for three years and who possesses certain other prescribed qualifications may be examined by the State Board to determine his fitness to receive a Certificate of Registration as a Registered Optometrist. Every registered apprentice shall, at the end of five years of such study, be examined by the State Board of Optometry to determine his fitness to receive a Certificate of Registration as a Registered Optometrist. If the registered apprentice fails in such examination, he may apply for another examination within one year of the original application date. Failure at the second examination or failure to apply for either examination at the time required by this rule shall constitute grounds for the State Board's

refusal to renew the applicant's Certificate as a registered apprentice.'

"Will your office please be so kind as to give our Board an opinion as to whether or not the State Board may promulgate such a rule and as to its validity."

Your request makes reference to Section 10115, Laws of Missouri, 1943, page 973, and that section in its entirety provides:

"A person is qualified to receive a certificate of registration as a registered optometrist:

"(a). Who is at least 21 years of age.

"(b). Who is of good moral character and temperate habits.

"(c). Who has graduated from a high school or secondary school approved by the state board of optometry or who has completed an equivalent course of study as determined by an examination conducted by the state board of optometry.

"(d). Who has graduated from a school of optometry approved by the state board of optometry or who has studied for three years as a registered apprentice under an optometrist registered under the laws of this state provided that said three years of study as a registered apprentice shall have been started prior to October 1, 1943.

"(e). Who has passed a satisfactory examination conducted by the state board of optometry to determine his fitness to receive a certificate of registration as a registered optometrist."

It is under this section that the proposed rule is to be adopted and the provisions of this section are definite

enough to require no interpolation. Any person who is qualified under this section is entitled to receive a certificate of registration as a registered optometrist. The Missouri State Board of Optometry proposes, by regulation, to limit the period of time that a registered apprentice-optometrist may continue in that status. We must, therefore, determine whether or not that board has authority to increase this period of time.

59 C. J., page 112, Section 119, states:

"Powers granted to state administrative agencies must be exercised in a just and reasonable manner, and in conformity with the statutory or constitutional source of the power conferred."

In support of this statement several cases are cited. In the case of *Kaw Valley Drainage Dist. v. Missouri Pac. Ry. Co.*, 99 Kans. 188, 161 Pac. 937, 1. c. 945, it is held:

"* * * when the state creates an agency to serve its public needs and confers administrative powers upon it, whatever be the language of the statutes conferring such powers, a just and reasonable exercise of such powers is intended, and the power to make or exercise unreasonable, arbitrary, and confiscatory orders is not intended. Such is the spirit of our own Bill of Rights and of the Fourteenth Amendment which have been expounded times without number by this court and by the federal Supreme Court."

In the case of *State ex rel. Woolridge v. Morehead*, 100 Neb. 864, 161 N. W. 569, LRA 1917D, 310, the Supreme Court of Nebraska, in discussing a state banking board, stated in 161 N. W., 1. c. 572, as follows:

"The powers of the board not granted by the statute are withheld. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *Scribner State Bank v. Ransom*, 35 S. D. 244, 151 N. W. 1023; *State v. Cook*, 174 Mo. 100, 73 S. W. 489."

The rule is well stated in the case of *Huffman v. State Roads Commission*, 137 Atl. 358 (Md.), l. c. 366, as follows:

"* * * It is generally recognized, however, that, while such agencies are governmental, they have no powers, but such as are expressly delegated to them by the organic or statutory law of the government of which they are a part, or such as are by implication essential to the full and adequate exercise of such express powers."

The following cases are in accord with the last stated rule: *City of Newark v. Civil Service Commission*, 177 Atl. 868, 115 N. J. L. 26; *State v. Erickson*, 244 Pac. 287, 75 Mont. 429; *State ex rel. Collins v. Holladay*, 252 N. W. 733, 62 S. D. 256.

Section 10115, Laws of Missouri, 1943, page 973, provides for a three-year period of study for a registered apprentice-optometrist. The Missouri State Board of Optometry proposes to place a maximum period of time for which a registered apprentice-optometrist may continue his study, which, under the rules set out herein, is not within its authority.

Conclusion

It is, therefore, the opinion of this department that, since Section 10115, Laws of Missouri, 1943, page 973, sets forth the qualifications that a person must have to receive a certificate of registration as a registered optometrist, the State Board of Optometry is without authority to limit the qualification-period of study of a registered apprentice under a registered optometrist, to five years, by adoption of a regulation to that effect.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION:
COUNTY COURTS:

Roads:

Section 13763, R. S. Mo. 1939 is a complete scheme providing for the levying and expenditures of funds for particular road purposes.

February 8, 1946

FILED
//

9/20

Mr. G. R. Breidenstein
Prosecuting Attorney
Kahoka, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an official opinion of this department, which letter reads as follows:

"I would like to ask an opinion of your department.

"At the last general election this county voted to increase the tax levy by ten cents on the one hundred dollars valuation to raise money to construct and maintain all weather roads in the county, as authorized by Section 13763, R. S. Mo. 1939.

"In this county are several special road districts. Should that part of this tax which is collected on property in these road districts be turned over to these special road districts to be by them expended for the construction and maintenance of such all weather roads, or should this fund be administered by the county court."

Your question as to whether or not part of the tax which is collected on the property in special road districts should be turned over to these road districts and expended by them is answered in the same section which gives authority for the imposition of said tax.

Section 13763, R. S. Mo. 1939, in its pertinent part, reads as follows:

"* * * and said tax shall be kept as a special fund for the purpose or purposes voted and shall be expended under the direction of the county court for the purpose for which it was

voted and none other: Provided, that if the county court deems it advisable they may issue warrants against said tax in advance of its collection. (R. S. 1929, Sec. 12104.)"

Our interpretation of the above quotation is that the County Court has complete control over the expenditure of the monies raised by any levy authorized under this section of the Missouri statutes. We believe the statute is sufficiently express and unambiguous, and contains its own direction for expending the funds raised under said Section.

We are aware that a conflict appears to arise between Section 13763, R. S. Mo. 1939, and other sections of the Missouri Statutes for the levy of road taxes and the distribution of the funds raised thereby. We have examined those statutes and find that the levies made thereunder are upon a different basis than the levy made under Section 13763, supra, or that they relate back to another statute that provides for the levy. For example, Section 8526, R. S. Mo. 1939, provides for the general levy of road taxes as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'" R. S. 1929, Sec. 7890.

Sections 8527 and 8715, R. S. Mo. 1939, are in furtherance of the direction in Section 8526, R. S. Mo. 1939. However, Section 13763, R. S. Mo. 1939, is a special statute providing for the levy of taxes for a particular road fund, and contains within itself a complete scheme for the levying and expending of the funds raised thereunder. Where a statute is by nature a special statute and contains a complete scheme within itself, such statute will prevail over the general statutes relating to the same subject matter. The case of *State v. Ross*, 57 S. Ct. 60, 299 U. S. 72, held that special statutory provisions prevail over general ones which, in absence of special provisions, would control. The same principle was announced in *State ex rel. McDowell v. Smith*, 67 S. W. (2d) 50, 334 Mo. 653, the court holding where special and general statutes relate to the same subject matter, a special act will prevail as far as particular subject-matter comes within its provisions.

At l. c. 57, the court said:

" (10-12) 'It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.' Lewis-Sutherland, Stat. Const. vol. 1 (2d Ed.) Section 274, pp. 537-539. See, also, State ex rel. Rutledge v. School Board, 131 Mo. 505, 516, 33 S. W. 3; Manker v. Paulhaber, 94 Mo. 430, 440, 6 S. W. 372." (underscoring ours.)

None of the other sections of the statutes that we have examined contain such a complete scheme or could stand alone in all aspects as does Section 13763, supra. For these reasons we do not believe the other sections of the statutes relating to the distribution of monies raised upon property in special road districts are applicable.

CONCLUSION

In our opinion funds raised under Section 13763, R. S. Mo. 1939, may be expended under direction of the county court for the purposes for which they were voted and none other, as provided by statute.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:mv;da

ELECTIONS: Who entitled to be considered candidates;
what is a proper declaration of
PRIMARIES: candidacy.



July 1, 1946

7-5

Mr. Elyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"I would very much appreciate having an official opinion from your office as to the following state of facts:

"On the last day for filing declarations of candidacy, that is, on April 30, there was filed in the office of the County Clerk of Phelps County the declaration of a certain individual as a Republican candidate for the office of County Treasurer. The name of this individual was written on the declaration and brought in by another party and filed by such other party. The declaration was not signed by anybody as an agent of the candidate, but the name of the candidate was written on the declaration as if he himself had signed it.

"A few days after the 30th of April and after the expiration of the date for filing such declarations, the individual who was supposed to be a candidate appeared in the office of the County Clerk and stated to the County Clerk he had not signed the declaration, and that he was not a candidate. Over a month later, this same individual wrote the County Clerk a letter in which he requested that his name appear on the ballot as a candidate in accordance with

the declaration that had been previously filed, and saying that he authorized the Clerk to put his name on the ticket. The letter was written in the present tense and did not state that he had authorized the party who filed the declaration to do so at the time that it was done on April 30.

"The question now is whether under the provisions of Section 11550 of Laws of Missouri, 1944, Page 25, there has been a valid filing by this candidate. There is no question but what he himself did not sign the declaration, and he did not authorize such declaration to be filed in his behalf at the time this occurred. He wholly disclaimed any responsibility for the filing in a personal conversation with the County Clerk, but thereafter requested in writing that his name appear on the ballot as a candidate.

"In view of the fact that sample ballots will be printed by the County Clerk in the near future, I would appreciate receiving this opinion as soon as you can conveniently prepare it and send it to me."

Replying to the same, Section 11550, Laws of Missouri, 1944, Extra Session, provides as follows (omitting form):

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

* * * * *

In the case of State v. Arnold, 210 S.W. 374, 277 Mo. 474, our Supreme Court, en banc (1919), decided a case where the petitioner desired to file as a candidate but was unable to find the officer (treasurer) to make payment to and get receipt on the last day of filing, and on the day following did locate him and made tender and was refused. In ruling the petitioner was entitled to file, the court said:

"In such case the untrammelled constitutional privilege of all eligible persons to become candidates for office requires us, if we are to escape holding this statute invalid for that it contravenes the spirit and the letter of the Constitution in denying this privilege, to say that, if the proposed candidate be in no wise in default, and the death of the treasurer, or the latter's illness, or his absence from his office, from the city, or from the state, shall prevent the making of the required deposit and the obtention of the required receipt on the day prescribed by the letter of the statute, all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt, provided such filing of the receipt shall be in time to allow of the performance by the board of election commissioners of the very first of the ensuing duties incumbent upon them by law. The fair, just, and equitable construction by this court of the election laws and machinery of this state in the analogous cases of Wance v. Kearby, 251 Mo. 374, 158 S.W. 629, and State ex rel. v. Seibel, 262 Mo. 220, 171 S.W. 69, ruled by this court in opinions by Lamm, C. J., requires such a construction of this statute at our hands. The demurrer should be overruled."

In the case of State ex rel. Dodd v. Dye (Mo. App.), 163 S.W. (2d) 1055, the Springfield Court of Appeals, in 1942, held that the receipts need not necessarily be filed concurrently with the declaration. There the receipts, bearing date June 1, 1942, were deposited with the county clerk July 3,

1942, and that was by the court held to be compliance in that respect. The other point there ruled was that if the signer for another had authority from that other to sign the "other" name to the declaration, such signing will be approved by the court. That case, from the writer's viewpoint, stretches the law to uphold the filing, and if it had been certified to the Supreme Court it is doubtful whether it would be sustained. But giving full faith and credit to the opinion of the Court of Appeals, it still falls far short of holding your man to have complied with the statute, because he never signed the declaration, nor did he authorize the one who did sign for him. In effect, the signing by another without consent of the proposed candidate is very close to, if not in fact, a forgery.

Under the facts as you state them, and under the law as declared by our Supreme Court, en banc, in the Haller case, supra, the man who now seeks to be placed on the ticket as a candidate was in default; he had not done the things required by the law in order to file. On the contrary he had expressly repudiated the filing.

Your letter is silent as to whether he filed a receipt or paid the appropriate fee. The primary law has as one of its main purposes the requirement about filing, so that the public and other candidates may not be entrapped. It is a wise provision that the law requires the field to be made up for a reasonable time, provided by statute, and the statute should be substantially complied with. That was not done in the case you state.

Conclusion.

It is our opinion that timely filing a declaration of candidacy, bearing what purports to be the signature of the declarant but which was in fact not his signature and was not authorized, and which signature he afterward disclaimed any responsibility for, is not compliance with the statute prescribing the method of filing a declaration of candidacy,

Mr. Llyn Bradford

-5-

and does not entitle the party to have his name printed as a candidate on the forthcoming primary ballot.

Very truly yours,

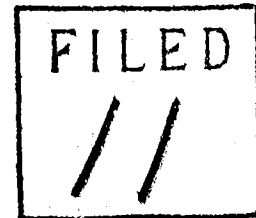
DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OW:ml.

July 9, 1946



7/24
Charles A. Brasher, M. D.
Superintendent
Missouri State Sanatorium
Mt. Vernon, Missouri

Dear Sir:

We hereby acknowledge receipt of your recent request,
which reads in part as follows:

"* * * Senate Bill No. 349, Section 1,
abolishes the state board of health, the
board of managers of the state eleemosynary
institutions and the state social security
commission, and all the powers and duties
heretofore exercised by them are vested in
'the department of public health and wel-
fare,' headed by a director. Then, there
will be established three divisions of this
department; namely, the division of health,
the division of mental diseases, and the
division of welfare, and the division of
health (Sec. 13) will have control and ad-
ministration of this hospital.

"In other words, the direction of this
hospital will no longer be under the same
direct administration as the mental hos-
pitals (formerly referred to as the elee-
mosynary institutions) but will now be
under the division of health which is
successor to the present state board of
health.

"Since Senate bill 129 was passed in March
and 'related to State Eleemosynary Insti-
tutions,' a term generally used for mental
hospitals, we wondered if this hospital,
which will no longer be in this group on

July 1st, but under the division of health, would still be considered under Senate bill 129, Sec. 9283, which places the employees of 'the several institutions' under a merit system and a minimum compensation of \$900.00 per year."

Senate Bill No. 129, referred to in your letter, provides:

"AN ACT To repeal Section 9283 of Article I, Chapter 51, Revised Statutes of Missouri 1939 relating to State Eleemosynary Institutions, nurses, attendants, and other employees and relating to their employment and their compensation, and to enact a new section to be known as Section 9283 relating to the same subject matter.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. That Section 9283 of Article I, Chapter 51, Revised Statutes of Missouri 1939 relating to State Eleemosynary Institutions, nurses, attendants, and other employees, their employment and compensation, be and the same is hereby repealed and a new section enacted in lieu thereof relating to the same subject matter to be known as Section 9283 and to read as follows:

"Section 9283. All nurses, attendants, and other employees necessary to the economic administration of the several institutions shall be employed on the basis of merit as provided by law; provided, however, that no employee shall be paid as compensation for his or her services less than \$900.00 per year."

At the time that this act was adopted and signed, the Missouri State Sanatorium was under the control of the Board of Managers of the State Eleemosynary Institutions. In determining which institutions were intended to be affected

by this act, we may properly examine the title to ascertain the intention of the Legislature. The case of Holder v. Elms Hotel Co., 92 S. W. (2d) 620, 1. c. 622, 338 Mo. 857, 140 A. L. R. 339, states:

"* * * Since the title to an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it may be looked to as an aid in arriving at the intent of the Legislature. Strottman v. St. Louis, I. M. & So. R. Co., 211 Mo. 227, 109 S. W. 769."

You will note that in the title of Senate Bill No. 129, supra, reference is made to Article I, Chapter 51, Revised Statutes of Missouri 1939 relating to State Eleemosynary Institutions. We may assume, therefore, that it was the intention of the Legislature in adopting this act that it should affect all such State Eleemosynary Institutions. In that same article and chapter, Section 9258 defines State Eleemosynary Institutions as follows:

"The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri state sanatorium, at Mount Vernon, and the Missouri state school, at Marshall, are hereby declared to be state eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article."

We may, therefore, conclude that, in the absence of the showing of a contrary intention, the Legislature intended that Senate Bill No. 129 should apply to all of the eleemosynary institutions designated by Section 9258, R. S. Mo. 1939, supra. This is true especially in the light of the fact that Senate Bill No. 349 was adopted subsequently to Senate Bill No. 129. Senate Bill No. 129 was sent to the Governor on March 14, 1946, whereas Senate Bill No. 349 was sent on April 1, 1946, at which time Senate Bill No. 129 had already been signed. We merely mention this in passing to assist us in

arriving at the true legislative intention.

Looking to Senate Bill No. 349 for a declaration of intention, contrary to that above noted, Section 1 thereof provides:

"There is hereby created and established as a department of state government a department of public health and welfare, which may hereafter be referred to as the department. The scope and purpose of the department of public health and welfare shall be to improve and protect the health of the people of the State of Missouri; to care for the mentally ill and those who are ill from other causes, so far as the laws of Missouri shall provide; to provide care and maintenance for certain other persons, as provided by law; to administer laws concerning social welfare, including certain social security laws. The department of public health and welfare shall be composed of three divisions, namely: the division of health, the division of mental diseases, the division of welfare. The state board of health as established by Article I, Chapter 57, Revised Statutes of Missouri, 1939, the board of managers of the state eleemosynary institutions, as established by Article I, Chapter 51, Revised Statutes of Missouri, 1939, and the state social security commission, as established by Article I, Chapter 52, Revised Statutes of Missouri, 1939, all as amended, are hereby abolished and discontinued and all powers and duties over activities and institutions pertaining to, controlled by and administered through the state board of health, the board of managers of the state eleemosynary institutions, and the state social security commission shall henceforth be vested in

and administered through the department of public health and welfare, together with any additional powers and duties which may herein or hereafter be assigned to the department." (Underscoring ours.)

By this section the Board of Managers of the State Eleemosynary Institutions was abolished. However, we find no reference to the institutions themselves which changes their status insofar as Senate Bill No. 129 is concerned.

Section 13 of Senate Bill No. 349 provides:

"All powers and duties heretofore under administration and control of the state board of health, except the examination and licensing of persons, shall henceforth be under administration and control of the department of public health and welfare and shall be assigned to the division of health within the department, together with all other powers and duties which may herein or hereafter be assigned. In all laws of Missouri, and orders and findings issued thereunder, wherever the term state board of health is used, the term division of health shall hereafter be substituted and understood. The division of health shall also have control and administration over the Missouri state sanatorium at Mt. Vernon in the same manner and to the same extent as has heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions under Article I, Chapter 51, Revised Statutes of Missouri, 1939, with amendments thereto. The division of health shall also have such jurisdiction over the accounts of city and county tuberculosis hospitals as has heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions. The

cancer commission of the state of Missouri, as established by Chapter 125, Revised Statutes of Missouri, 1939, as amended, is hereby assigned to the division of health in the department of public health and welfare." (Underscoring ours.)

Although the control and administration of the Missouri State Sanatorium at Mt. Vernon is transferred to the Division of Health of the Department of Public Health and Welfare by virtue of this section, it is to be noted that this control and administration is to be in the same manner and extent as was exercised by the Board of Managers of the State Eleemosynary Institutions under Article I, Chapter 51, R. S. Mo. 1939, with amendments thereto. Senate Bill No. 129 is in effect an amendment to Article I, Chapter 51. This would lend even more support to the conclusion that the Legislature intended that Senate Bill No. 129 should apply to the Missouri State Sanatorium.

CONCLUSION

It is, therefore, the opinion of this department that Senate Bill No. 129 applies to the Missouri State Sanatorium at Mt. Vernon.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JHA:LR

SCHOOLS:

COUNTY AND TOWNSHIP FUNDS:

Procedure for election and distribution of county and township school funds.

October 1, 1946

FILED
//

copy to Mr. Brady

Honorable F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

This is in reply of yours of recent date wherein you request an official opinion from this department on the following statement of facts:

"I would like to have your opinion with reference to sections 10376.1 and 10376.2, concerning 'Annual distribution of capital of liquidated county and township school funds - petition for election', and 'Election on distribution of funds - notice - ballots - distribution of funds.'

"Section 10376.1 provides for the calling of an election to decide whether the capital of the fund is to be distributed annually by the county court, upon petition of 5% of the voters of the county, and section 10376.2, provides for submission of such proposal at a special election to be held for that purpose within sixty days after the filing of the petition therefor.

"I would like to know if this question can be legally submitted at a General Election, such as will be held in this state on November 5th., of this year or if such matter can only be submitted at a special election called for such purpose, upon proper petition being filed, (assuming of course that proper petition is filed with the county court so that proper notice can be given before such General Election as provided in section 10376.2).

"I would also like to know if, when the proposition for annual distribution of

the school fund has been approved by the voters, the county court should proceed to distribute all of the principal of such funds then on hand, including any accumulated interest, and then thereafter distribute whatever accumulates in such funds annually."

By Article 9, Section 7 of the Constitution of 1945, provision is made for the liquidation and reinvestment of county and township school funds. Said Section 7 reads as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

It will be noted that this section of the Constitution provides that the counties by majority vote of the qualified electors may elect to distribute the school funds annually in the manner prescribed by law. By virtue of the authority conferred by the aforesaid section of the Constitution, the 63rd General Assembly enacted Senate Bill No. 186 which was

approved on April 26, 1946, and carried an emergency clause which bill, insofar as it relates to the subject of your inquiry, provides as follows:

"Section 1. Whenever there shall be presented to the body having in its charge the capital of the county and township school funds of any county or the City of St. Louis a petition, signed by qualified electors of said county or the City of St. Louis equal in number to five per cent of the voters casting a ballot in said county or the City of St. Louis for the office of governor at the last preceding general election at which said office was voted upon, praying that the proposal be submitted to the qualified electors for making annual distribution of the capital of the liquidated school fund, such body shall cause an election to be held upon said proposal.

"Section 2. Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor.* * * *

"* * * The results of the balloting at each election precinct shall be certified by the judges of election of such election precinct and attested by the clerks and transmitted to the body having control of the capital of the county and township school funds, which said body shall, from such results so certified and attested, within ten days, determine whether the proposal to distribute annually the liquidated capital of the county and township school funds has received a majority of the votes cast in the county or City of St. Louis wherein such election shall have been held. If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds to the school districts. The accumulated balance of such funds shall be apportioned on or before August 31 of each year, until such funds are

liquidated and said apportionment shall be based upon the last enumeration on file in the office of the county clerk.* **

Your inquiry goes to the question of whether or not the special election held under authority of this act may be held on the same day that a General Election is held. In connection with a question similar to this in that the question of whether or not a special election for the purpose of voting bonds could be held on the same day that the General Election was held, I find that this department on December 29, 1945, by an opinion to Mr. Bradford, prosecuting attorney of Phelps county, held that a special election for the purpose of voting bonds could be held on the same day that the primary or a General Election is held. We are enclosing a copy of that opinion with this opinion.

We do not find where a similar question has been before our courts; however, we find that in the State of Illinois in the case of People v. Czarnecki, 143 N. E. 840, 3112 Illinois 271, the court had before it the question of whether or not the election of a state senator to fill a vacancy who was elected at a special election could be held at the same time that the General Election was held. It was held in that case that the special election to fill the vacancy could be held on the same day as the General Election, even though it was classed as a special election. The reasoning of the court was to the effect that it was a special election to fill a vacancy in office and that did not necessarily prohibit the holding of the election on the same day that the General Election was held.

In the case of Furste v. Gray, 42 S. W. (2nd) 889, the Court of Appeals of Kentucky had before it the question of whether or not a special election could be held on the same day that the General Election was held. At 1. c. 891, the court, in discussing the question, said:

"Section 148 of the Constitution provides:
'Not more than one election each year shall be held in this state or in any city, town, district, or county thereof, except as otherwise provided in this Constitution.' * * * "

"Argument that this section applies in this case is answered by a reading of it in connection with section 152, wherein it was 'otherwise provided' that vacancies in the General Assembly may be filled by special election and in such manner as may be provided by law. True, the time for holding the special election may by the

writ be fixed for the same day as the general election, that being in the discretion of the officer issuing the writ, but it is no less a special election, and the issuance of the writ no less prerequisite to its validity."

From examination of the act, we find that the only requirements that the body calling the election must meet are that the proper petitions shall be filed and that the election shall be held within sixty days after the filing of these petitions. No provisions are made in the bill whereby the election cannot be held on a General Election day or wherein they must be held at a time prior to or after a General Election. That being the case, we can see no reason why the election under this act may not be held on General Election day provided sufficient notice of the election has been published.

On your second question as to when the court should proceed to make the distribution of funds provided for in the act in case the voters at such an election approve the proposition for distribution of the funds. As noted in the foregoing provision of Section 2 of the act, it is provided that if the proposal for the distribution of the fund received a majority of the votes cast, the body having control of the funds shall proceed thereafter to distribute annually such liquidated funds to the districts. Then it is provided that the accumulated balance of such funds shall be apportioned on or before August 31 of each year until such funds are liquidated. These provisions of the act show clearly that the law makers intended that these funds be distributed annually, and that they be apportioned on or before August 31 of each year. The act only requires the county court to distribute the funds annually and such distribution must be made on or before August 31. Then it seems that the time of distribution would be left at the discretion of the county court provided it is made annually and on or before August 31 of each year.

CONCLUSION

From the foregoing, it is the opinion of this department that the special election, provided for under Senate Bill No. 186 of the 83rd General Assembly for the purpose of testing the will of the voters as to whether or not the county and township school funds shall be distributed and apportioned, may be held on the General Election day in November, 1946, provided sufficient notice of said election has been published. We are further of the opinion that if a majority of the voters voting

Hon. F. M. Brady

(6)

at said election vote in favor of the proposal to distribute the said school funds, then the county court may distribute such funds at any time before August 31, following said election.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

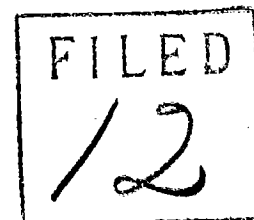
APPROVED:

J. E. Taylor
Attorney General

TWB:VLM

INSANE PERSONS: Probate Court has authority under Section 605, R. S. Mo. 1939, to commit a veteran to an institution outside the State of Missouri.

January 21, 1946



Honorable Joseph N. Brown
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

General Taylor wishes to acknowledge receipt of your recent request for an opinion which reads as follows:

"The question has arisen here as to whether or not either the Probate Court or the County Court has authority under any statute of this State to making an order committing a veteran to an institution located in a state other than the State of Missouri.

"I am aware that veterans are in fact being sent by courts in this State to hospitals in foreign states. However, I have been unable to find any statute which expressly authorizes such practice, and the judges of the Probate Court and the County Court here have raised this question and are apprehensive less they do not have authority to make such an order. This question was raised today in a case in the County Court and was continued to Saturday January 26, in order that we might obtain an opinion from your office on same."

Chapter 1, Article 22, Section 605, R. S. Mo. 1939, provides:

"Whenever it appears that a veteran of any war, military occupation or expedition is eligible for treatment in a United States veterans' bureau hospital and commitment to such hospital is necessary for the proper care and treatment of such veteran, the courts of this state are hereby authorized to communicate with the official in charge of such hospital with reference to available facilities and eligibility, and upon receipt of a certificate from the official in charge of such hospital the court may then direct such veteran's commitment to such United States veterans' bureau hospital. Thereafter such veteran upon admission shall be subject to the rules and regulations of such hospital and the officials of such hospital shall be vested with the same powers now exercised by superintendents of state hospitals for mental diseases within this state with reference to the retention of custody of the veteran so committed. Notice of such pending proceedings shall be furnished the person to be committed and his right to appear and defend shall not be denied."

We find no provision in this Act whereby the court is limited to the boundaries of this state in making such commitments. We are further advised by the State Service Officer that there is no veterans' facility available in this state such as is equipped to handle mental cases. This was also true at the time of the adoption of this Act. It must, therefore, have been the intention of the Legislature that the courts should be authorized to make such commitments to such institutions in other states.

Conclusion

It is, therefore, the opinion of this department that the probate court has authority to make an order committing a veteran to an institution located in a state other than the State

Honorable Joseph N. Brown

-3-

of Missouri by virtue of Section 605, supra.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

SHERIFFS:
CONSTITUTIONAL LAW:

RE: The sheriff of Greene County and his deputies
are paid according to the provision of House
Bill No. 939 after July 1, 1946.

July 22, 1946

FILED

12

8/2

Honorable Joseph N. Brown
Prosecuting Attorney
Springfield, Missouri

Dear Mr. Brown:

This will acknowledge receipt of your letter of recent date
requesting an opinion of this department as follows:

"It is our information that the Prosecuting
Attorney of Buchanan County has requested an
opinion regarding the new laws effecting
counties in the second class concerning pay-
ment of the sheriff and his deputies. We are
confronted with the same problem in this
county, hence would appreciate a copy of any
opinions rendered to Buchanan County.

"Our main concern is whether or not the sheriff
and his deputies are paid under the new schedule
as set up by the laws pertaining thereto which
become effective July 1, 1946."

This department has not, to date, written any opinions re-
garding payment of officers in Buchanan County, Missouri. How-
ever, we will proceed below to answer the question you raise
with regard to the sheriff of Greene County and his deputies.

Section 2, page 2 of House Bill No. 939, passed by the 63rd
General Assembly and approved by the Governor reads, in part, as
follows:

"Section 2. The sheriff, in all counties of
the second class, shall receive as compensation
for his official services rendered in connection
with criminal matters, the sum of \$3600.00 per
annum; to be paid to him in twelve equal monthly
installments by warrants drawn on the county
treasury."

Section 5, page 3, House Bill No. 939 reads, in part, as follows:

"In counties of the second class, the sheriff is hereby authorized to withhold and retain, as compensation for his official services in civil matters, from the fees, penalties, charges, commissions and other money collected by him for his services in such matters, the sum of \$3900.00 for each year of his official term."

Section 9, page 7, of House Bill No. 939, provides as follows:

"The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office. Such deputies shall be appointed by the sheriff, but no appointment shall become effective until approved by the judges of the circuit court of the county. The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

Section 13, Article VI of the Constitution provides as follows:

"Section 13. Compensation of Officers in Criminal Matters--Fees.--All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

The above constitutional provision requires that sheriffs, as county officers, shall be compensated for their services in criminal matters by salaries only. Under Section 2 of the Schedule of the Constitution all laws inconsistent with the Constitution remained in force until July 1, 1946. Therefore, any statute providing for the compensation of sheriff for criminal services in a manner other than by salary ceased to be in force and effect on and after July 1st of this year. The Constitution provided that salaries should be paid sheriffs for their services in criminal matters after July 1, 1946, and to meet this requirement House Bill No. 939 was passed.

Section 13 of Article VI of the Constitution also provided that fees earned by sheriffs in civil matters may be retained by them "as provided by law". This allowed the Legislature to fix a maximum compensation for sheriffs in civil matters as well as in criminal matters if they so desired and so it was provided in Section 5 of House Bill No. 939 that sheriffs in second class counties were to retain the sum of thirty-nine hundred (\$3900.00) dollars per year for their services in civil matters. The provisions of House Bill No. 939, quoted above in this opinion are, therefore, consistent with the provisions of Section 13 of Article VI of the Constitution.

The question for determination, then, is whether the above quoted provisions of House Bill No. 939 conflict with any other provision of the Constitution. Section 13, Article VII of the Constitution provides as follows:

"Sec. 13. Limitation on Increase of Compensation and Extension of Terms of Office.--The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The above constitutional provision is not applicable to deputy sheriffs in Greene County. In State ex rel. Dwyer v. Nolte, 172 S. W.(2d) 851, 351 Mo. 278, the court said, 1.c. 277 and 278:

"A constitutional or statutory provision prohibiting a change of compensation after an election or appointment during the term of an officer does not apply where, prior to such time, no salary or compensation has been fixed for the office.* * *

"Since the Municipal Assembly, acting as a county court, did not fix the salary of the Treasurer under the provisions of Sec. 13800, it follows

that there was no (857) valid legislative act fixing that salary until May 22, 1939, the effective date of Laws, 1939, p. 486, which fixed the salary at \$8,000.00 per annum. No salary having been lawfully fixed at a lower figure at the beginning of the term to which relator was elected, we hold the Act of May 22, 1939, did not increase his salary during the term for which he was elected, and so Section 8, Article XIV of the Constitution of Missouri was not violated."

In State ex rel. v. Gordon, 142 S. W. 115, 238 Mo. 168, the court said, l. c. 176 and 177:

"* * * Observe, the Constitution does not say that the salary of no officer can be increased at any time. It says such salary shall not be increased during a certain time or while a certain thing lasts. What is that time or thing? It is 'his term of office.' Therefore the officer in mind is not any officer, but is one of a definite kind, one who has an official term. If an officer has no 'term of office' he does not measure up to the constitutional subject-matter and is not within the words or intentment of the Constitution. Undoubtedly the Adjutant-General is an officer and has an office, but has he a 'term of office?' Or, to turn the phrase end for end, to let it interpret itself, has he an office with a term? In the nature of things there cannot be a term of office unless the office has a term. The idea is fortified by the constitutional interdiction against lengthening a term of office; for it is a logical absurdity to speak of not extending a term of office unless the term exists to extend.

* * * *

"* * * The only circumstance required in limitations of terms for years is, that a precise time shall be fixed for the continuance of the terms; so that when the commencement of the term is ascertained, the period of determination, by effluxion of time, may be known with certainty.' (Idalia Co. v. Norman, 232 Mo. l. c. 670, et seq.)* * * Thus, if the beginning is certain, and if the end can be made certain by reference to some mentioned certainty, a term is granted.* * * "

The case of State ex rel. Johnson, 27 S. W. 399, 123 Mo. 43, held the same as State ex rel. Gordon, supra. These cases dealt with the increase of compensation of officers under Section 8, Article XIV of the Constitution of 1875. This constitutional provision was the same in substance and almost identical in wording as Section 13, Article VII of the new Constitution. Deputy sheriffs were paid by the sheriff under Section 13451, R. S. Mo. 1939 in Counties of the population of Greene County and did not have a term of office. Under House Bill No. 939 they are paid a salary to be fixed by the sheriff and approved by the judges of the circuit court of the county and no term of office is fixed for them in the Bill. Therefore, deputy sheriffs in Greene County did not receive a fixed compensation and did not have a term of office under the law as it existed prior to the passage of House Bill No. 939. Furthermore, they do not have a fixed salary or a definite term of office under House Bill No. 939. Therefore, under the rulings of the cases above quoted, the provisions of Section 13, Article VII of the Constitution are not applicable to deputy sheriffs in Greene County, and the provisions of House Bill No. 939, relative to deputy sheriffs, could not be unconstitutional in this respect.

The question remaining for determination is whether the provisions of House Bill No. 939, relating to the salary of sheriffs in second class counties, are in conflict with Section 13, Article VII prohibiting an increase in the compensation of officers during their term.

Section 13451, supra, provided, in part, as follows:

"Sec. 13451. Authorizing sheriff to retain fees--
amount

"In all counties of this state that now have or may hereafter have, a population of not less than eighty thousand nor more than ninety-five thousand according to the last decennial census of the United States, the sheriff shall be allowed to retain out of the compensation, fees and commissions received by him in accordance with any section or provision of law authorizing said sheriff to charge, receive or be paid any compensation, fees or commissions, a sum not to exceed sixteen thousand (\$16,000.00) dollars for himself and deputy hire, in any one year. It shall be the duty of such sheriff to charge, collect and receive all compensation, fees and commissions now authorized by law to be charged, collected and received by him, but no such sheriff shall retain as compensation for himself and for deputy hire in excess of

the sum of sixteen thousand (\$16,000.00) dollars.
* * *

You will note that this section does not set a specific amount which can be retained by the sheriff as his personal salary. The sixteen thousand (\$16,000.00) dollars mentioned was the salary of the sheriff and of the deputies which he hired. It was thus impossible to determine what was the maximum salary that the sheriff would retain under Section 13451, supra. However, Section 13 of Article IX of the Constitution of 1875 read, in part, as follows:

"Sec. 13. Fees of county or city officers, limit--
quarterly returns-- penalty

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Thus, the Constitution of 1875 placed a limit upon the amount of compensation the sheriff, as a ministerial officer, could retain. This constitutional provision was in force up until the new Constitution went into effect in March of 1945. The present sheriff of Greene County was elected in the general election of 1944 and took office the first Monday in January, 1945, prior to the effective date of the Constitution of 1945.

The question of whether the ten thousand (\$10,000.00) dollar maximum in the Constitution of 1875 should be considered the salary of the sheriff in Greene County for the purposes of determining whether he has received an increase under the provision of House Bill No. 939, is, we think, determined by the case of State ex rel. Emmons v. Farmer (1917) 196 S. W. 1106, 271 Mo. 306. In that case the Supreme Court of Missouri held that, for the purposes of determining whether there was an increase in the compensation of an officer in violation of the provision of the Constitution of 1875 prohibiting increases in compensation of officers during their terms, the statutory maximum which the officer was allowed to retain, prior to the enactment which it was claimed created an increase in compensation, was to be considered the compensation of the officer. The court said at l. c. 314, 316 and 317:

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the Act of 1915, does not exceed but exactly equals the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2000 yearly cash salary, the provisions of the Act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term.

* * * * *

"So, while it is conceded as the figures indicate, that there has been no increase in the stated amount fixed by law as the pay of a circuit clerk during the current term of this relator, yet it is urged there has been an increase in fact, unless the fees collected each year amount to as much as \$2000, regardless of the statutory provision existing when relator took office of retaining as his annual compensation \$2000 out of the fees earned and collected.

* * * * *

"The Act of 1915 putting circuit clerks upon a salary basis, was, it is plain, designedly enacted so that the several salaries fixed thereby and made payable monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the Act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from twenty-five to thirty thousand population would get the salary fixed by the Act of 1915 some years, and get fees other years, and it would be impossible ever

to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it (State v. Baskowitz, 250 Mo. 82); the other is that where one construction of a statute would render the act absurd and unforeseeable and the other the converse, we are required to adopt the latter rather than the former. (State ex rel. v. Gordon, 266 Mo. 1. c. 411.)

* * * * *

"We are constrained therefore to hold that the Act of 1913 (Laws 1913, p. 702) fixed the basic compensation for clerks of the circuit courts and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations, constitute the salaries from which we are to determine whether the Act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question and conclude that as to the relator there has been no increase and the act is constitutional. Let the judgment of the learned judge nisi be affirmed.* * *"

Ordinarily, the same rules of construction applicable to statutes apply also to the construction of Constitutions. State ex rel. Buchanan v. Imel, 146 S. W. 783, 242 Mo. 293.

While the court in the Farmer case dealt with a maximum compensation set by statute, it was applying, in substance, the same constitutional prohibition, the applicability of which we are here determining. Therefore, we think the similarity between the situation presented here and that of the Farmer case requires that we consider that case controlling on the question of the sheriff's compensation

under the old law. The result of this is that the compensation of the sheriff of Greene County under the old law was ten thousand (\$10,000.00) dollars per year.

This ten thousand (\$10,000.00) dollars per year was the sheriff's compensation when he began his term in January 1945. The new Constitution does not carry any provision such as that of Section 13 of Article IX of the Constitution of 1875. The ten thousand (\$10,000.00) dollars per year is, therefore, the compensation which the provision of House Bill No. 939 must not exceed if it is to remain consistent with Section 13, Article VII of the Constitution. It is clear that the total of seventy-five hundred (\$7500.00) dollars, provided under Sections 2 and 5 of House Bill No. 939 as compensation for the sheriff in second class counties, which includes the County of Greene, does not equal the former compensation of ten thousand (\$10,000.00) dollars and these sections of the Bill are, therefore, not in conflict with the Constitution of 1945.

CONCLUSION

It is, therefore, the opinion of this department that the sheriff of Greene County and his deputies should be paid after July 1, 1946 according to the provisions of House Bill No. 939, passed by the 63rd General Assembly and approved by the Governor on April 11, 1946.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

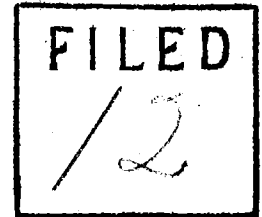
J. E. TAYLOR
Attorney General

SNC:mw

sent to Mr. G.

SCHOOLS: (1) Upon filing of petition for consolidation with county superintendent of schools, or filing of petition for annexation with school board of a common school district, jurisdiction attaches when the petition is filed. (2) In the formation of a consolidated school district the superintendent, in laying out the boundary lines of the proposed consolidated district, cannot include in such district part of a previously organized consolidated district.

July 30, 1946



8/3

Hon. Joe N. Brown
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of July 11, 1946, requesting an opinion from this department upon the following statement of facts:

"On June 5, 1946 eight rural school districts in Greene County, Missouri, to-wit: Districts Nos. 50, 54, 55, 56, 57, 77, 78 and 79, filed a petition with the County Superintendent of Schools of Greene County, Missouri, praying that they be consolidated and organized into a consolidated school district. This petition was signed by more than 25 qualified voters residing in the proposed consolidated district. The County Superintendent of Schools assigned to said proposed district the number, Consolidated School District No. 10.

"The County Superintendent of Schools investigated the needs thereof and determined and located the exact boundaries of the proposed consolidated district.

"The County Superintendent called a special meeting of the qualified voters of the proposed consolidated district for considering the question of consolidation. Said meeting was called for June 29, 1946. This call was made by posting within the proposed district 10 notices in public places, stating the place, time and purpose of such meeting. These notices were posted on June 14, 1946, being 15 days before the date of said meeting.

"The County Superintendent also posted on said June 14, 1946 five plats of the proposed consolidated district. The plats and notices were posted within 30 days after the filing of the petition.

"The County Superintendent filed a copy of the petition and of the plat with the County Clerk.

"On June 29, 1946 the said County Superintendent attended the special meeting, called it to order and a chairman and secretary were elected.

"The vote was taken by ballot on the proposed consolidation and the vote was 273 for consolidation and 130 against consolidation. Six directors were elected, two for three years, two for two years and two for one year. In other words, the statutes pertaining to proposed consolidation of school districts were strictly followed.

"On the 6th day of June (after the petition for consolidation above mentioned was filed with the County Superintendent of Schools) the Board of Directors of Rural District No. 57 (one of the eight rural districts in the proposed plat) had a meeting and voted to hold an election on June 24 to vote on the question of whether or not they should be annexed to another consolidated school district, to-wit: the Willard Consolidated School District. Notices reading, 'Done by order of the Board this 6th day of June' were posted. This election was had on June 24 and the district voted to be so annexed to the Willard Consolidated School District. On the evening of said June 24, the Board of Directors of the Willard Consolidated School District met and by majority vote accepted Rural District No. 57 in its consolidated school district.

"We would like to have the opinion of the Attorney General on (a) the legality of the formation of the new consolidated school district; (b) whether or not, upon the filing of the petition

with the County Superintendent of Schools, jurisdiction over the subject-matter of the proceeding was acquired by and vested in said superintendent of schools; (c) whether or not, if such jurisdiction was thus vested in the County Superintendent of Schools, Rural District #57, by order of its Board of Directors, could take any steps to be annexed to any other school district until the determination of the petition and election for the proposed consolidated school district.

"Due to the fact that estimates of income and expenses for the proposed consolidated school district must be filed by July 15 with the County Clerk, we request that you please give this your immediate attention.

"The only case we have found which is in point is the case of State ex rel vs. Lee, State Supt. of Public Schools, 284 SW 129."

In your letter of July 15, 1946, in reply to our letter asking for additional information, you enclosed the following statement:

"Question No. 1: Rural District No. 57 had a petition signed by 10 persons.

"Question No. 2: No. It was filed after the consolidation petition of 8 districts was filed.

"Question No. 3: District No. 57 joins the Willard Consolidation.

"Question No. 4: The proposed 8 district consolidation contains 248 children enumerated, without District No. 57 there would be only 191."

We are in receipt of a letter from Mrs. Nannie Coward, Superintendent of Public Schools of Greene County, in which she states that the petition for the formation of the consolidated district was received in her office about 9:30 A. M., June 5th, and that the petition for annexation of School District No. 57 to the Willard Consolidated School District was received by the School Board of School District No. 57 on the morning of June 5th, and she indicated in a telephone conversa-

tion that the petition for the annexation was received by the Board of Directors of School District No. 57 before she received the petition for the consolidation of the eight common school districts.

In rendering you an opinion regarding the validity of the annexation or consolidation, this opinion will necessarily have to be one in which the answer to your questions is given on the basis of certain facts. Since this is true, our opinion will apply only to the facts stated therein, and the actual time of the filing of the petitions for annexation and consolidation is a matter that will have to be determined before a definite answer can be given to your questions.

The answer to your questions involves two matters: First, the matter of jurisdiction, and second, whether or not a consolidated school district which is being formed can include as part of its territory part of a previously consolidated school district.

In regard to the first matter, it is our opinion that jurisdiction attaches upon the receipt of a petition for annexation or a petition for consolidation. Therefore, the matter of whether the annexation of School District No. 57 to Willard Consolidated School District was valid depends on whether or not the petition for annexation was received by the Board of Directors of School District No. 57 before the petition for consolidation of the eight common school districts was filed with the Superintendent of Schools of Greene County.

In the case of State ex rel. Fry v. Lee, 314 Mo. 486, 1. c. 501, the Supreme Court of Missouri said:

"Relators contend that the first jurisdictional act under the statute is the filing with the county superintendent of public schools of a petition signed by at least twenty-five qualified voters of the community. Respondent, on the other hand, contends that the first jurisdictional act under the statute is the posting, by the county superintendent, of the plats and notices required by the statute."

The court, page 507, said:

" * * * Immediately upon the filing of the petition, jurisdiction over the subject-

matter of the proceeding was acquired by, and vested in, the Superintendent of Public Schools of Camden County, and such jurisdiction remained in him until the question of the formation of the proposed consolidated district was determined by the qualified voters of the proposed district at the special meeting called by him for the consideration of that question. * * * "

The court, page 503, said:

"State ex rel. v. Young, supra, chiefly relied upon by respondent in support of his contention, was a mandamus proceeding, instituted by the directors of a school district in Cole County against the county commissioner of schools, to vacate an order or decision made by him relative to the formation of a new school district and a change of boundary lines of an existing district. The statute then in force, relating to the formation of new school districts, made it the duty of the directors of the districts affected, upon the filing of a petition signed by ten qualified voters residing in either of the districts affected, requesting a change in boundary lines or the formation of a new district, to post a notice thereof in each district interested twenty days prior to the time of the annual meeting. If a part of the districts affected voted in favor of, and a part against, such change, the matter was referable to the county school commissioner for decision, which decision was final and conclusive when transmitted to, and entered upon the records of, the various districts. It was alleged that the county school commissioner had no jurisdiction to make a decision in the matter for the reason that the petition, upon which the directors of the respective districts acted in posting notices of the proposed change to the voters, was not signed by ten qualified voters, as the statute required; that, therefore, the elections held in pursuance of such notices were void. In ruling the question then before this court, the learned writer of that opinion, speaking for

the court, said: 'I am inclined to think that the relators are wrong in respect to the supposed jurisdictional fact. The section makes it the duty of the directors to act, when ten qualified voters request them to do so, but it does not assume to prohibit them from acting of their own motion when the interests of the district, in their judgment, call for action. Their action terminates by posting a proposition for a change. The proposition so posted by them is the warrant of authority for the vote at the annual meeting, and not the preliminary request of the ten voters to submit the matter to a vote. If the preliminary request should be regarded in the nature of a jurisdictional fact, it is a fact which seems to be left to the directors to decide. It is for them to say that the petitioners are qualified voters; and when they have practically so declared by posting the proposition, I do not perceive how their decision can be successfully attacked in any collateral proceeding or by mandamus of the courts.' (Italics ours.)

"As we read the last-mentioned case, while this court therein ruled that the statute involved did not assume to prohibit the school directors from acting of their own motion, without the filing, by ten qualified voters of the district, of a petition requesting such action, nevertheless, the court in substance recognized the fact that the statute made it the duty of the school directors to act in the premises upon the filing of a proper petition calling for such action upon their part; in other words, this court inferentially, at least, considered and viewed the filing of a proper petition as a jurisdictional act calling for the judgment and decision of the directors upon the sufficiency of the petition so filed. Consequently, in our opinion, the cases cited by respondent in no sense negative the contention of relators herein."

In the case of State ex inf. Gentry v. Vickers et al., 320 Mo. 383, 1. e. 385, the court said:

" * * * Under our ruling in State ex rel. Fry v. Lee, 284 S. W. 129, we held that the filing of a petition with a county superintendent of schools for the formation of a consolidated district gave the superintendent of the county wherein the petition was filed jurisdiction over the territory embraced in the proposed district, although a portion of it was situated in an adjoining county."

Under the rulings in State ex rel. Fry v. Lee and State ex inf. Gentry v. Vickers, cited above, it must be held that jurisdiction attaches when the petition for consolidation or for annexation is filed, and when jurisdiction attaches, it is retained until the voters take action at the election held pursuant to the petition and decide what action shall be taken.

All acts relating to the same subject, or having the same general purpose, should be read in connection with the statute or provision thereof being construed, as together constituting one law. State ex rel. Columbia National Bank of Kansas City v. Davis, 284 S. W. 464, 314 Mo. 373.

A guiding and certainly correct rule for construction of statutes is set forth in State ex rel. v. Gordon, 261 Mo. 1. c. 649, quoting from Bishop on Written Laws, secs. 113a, 86, as follows:

"The completed doctrine resulting from a bringing together of its parts is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms."

Under these rules, it is apparent that the statute for annexation, Section 10484, R. S. 1939, and the statutes regarding consolidation of school districts, Sections 10493 and 10495, R. S. 1939, all found in Article 5, Chapter 72, R. S. 1939, provide ways in which school districts may be annexed or consolidated. Both methods, when followed as set out in the statutory provisions, result in the formation of school districts. Since both methods are provided for, under the holding in State ex rel. Fry v. Lee, cited above, it is clear that when

jurisdiction attaches for one method of procedure, it obtains until the question has been decided, and jurisdiction cannot be obtained by the filing of a petition for either consolidation or annexation until the first petition has been voted upon.

It is the duty of the school board of a school district, when a petition for annexation is presented to it, to order an election held for a vote to be taken on the annexation. It is also the duty of the superintendent of schools, upon receipt of a proper petition for consolidation, to lay out the boundary lines of the proposed consolidated district and to see that an election is held. Neither the superintendent nor the school board has any choice but to call an election when a proper petition is received. Even though the superintendent of schools has the power to lay out the boundary lines of the district, he has the positive duty of calling an election when he receives a proper petition.

The second matter to be decided is whether or not a proposed consolidated school district can include in its territory part of another consolidated district.

In the case of *Gross et al. v. Moreland*, 190 S. W. 961, the Kansas City Court of Appeals decided an injunction suit involving a consolidated school district. In that case there was a proceeding in equity to enjoin the defendant, as county superintendent of schools, from performing certain acts preliminary to the formation of a consolidated school district. The petition alleged that the plaintiffs were residing in a consolidated school district which was duly organized, and that the defendant, who had received a petition to lay out the boundaries of a proposed consolidated school district, in laying out these boundaries, included part of the territory that was in the consolidated school district in which the plaintiffs lived. The Kansas City Court of Appeals held that there was no unauthorized action taken by the superintendent of schools and that no injunction should issue. This case was decided in 1916.

However, in the case of *State ex rel. Fry v. Lee*, cited above, the court held that a jurisdictional matter was involved and did not go into the matter of including part of one consolidated district in a new consolidated district. The only question before the court was one of jurisdiction, and it was held that when one superintendent obtained jurisdiction, it was held until the voters had approved or rejected it. The question of part of the territory of an existing consolidated district being included in a proposed consolidated district was not directly before the court.

The Supreme Court of Missouri in the case of State ex inf. Gentry v. Vickers, cited above, said:

" * * * Other contentions aside, this conclusion finds force in the fact that the petition by the voters to the County Superintendent of Schools of Camden County in the Sullivan case was filed long before a like petition was filed in the Vickers case with the County Superintendent of Schools of Laclede County. In attempting to form the consolidated district in the Vickers case common school districts theretofore designated in the consolidated district in the Sullivan case were included. This was unauthorized and was in effect an attempt to destroy the autonomy of the consolidated district already formed in Camden County.
* * * "

When these two cases are considered together, it is clear that the holdings therein overrule the holding of the Kansas City Court of Appeals in the case of Gross et al. v. Moreland, cited above, although not expressly overruled in the opinions of the court.

The statutes provide methods for changing the boundary lines of consolidated districts. A consolidated district can be dissolved by a vote of two-thirds of the voters of the consolidated district, by the provisions of Section 10472, R. S. 1939, or by changing the boundary lines, under the provisions of Section 10410, R. S. 1939, or by the extension of the boundary lines of a city, town or village, under the provisions of Section 10466, R. S. 1939, and cannot have its boundary lines changed by attempted annexation of part of its territory by a proposed new consolidated school district.

Since the territory of one consolidated school district cannot be included in a proposed new consolidated district, it follows that if the petition for annexation of School District No. 57 to the Willard Consolidated District was filed before the petition for consolidation of the eight common school districts, and School District No. 57 was annexed to the Willard Consolidated School District and became a part thereof, the vote to form a new consolidated school district of the eight common school districts was invalid, void and of no effect, since jurisdiction had previously been obtained by the School Board of School District No. 57. If the petition for consoli-

dation of the eight common school districts was filed before the petition for annexation was filed, then the consolidation is a valid and existing one and the attempted annexation of School District No. 57 by the Willard Consolidated District is invalid, void and of no effect.

From the facts that have been given in your letters and the letter of Mrs. Coward, the procedure followed in both the annexation attempt and the consolidation attempt was correct, that is, the requisite of the statute in annexation or consolidation proceedings was carried out in each case. If it be established, as a matter of fact, that the petition for annexation was filed before the petition for consolidation, the consolidated school district could not in any way be held to have any existence, as it is agreed in the statement of facts by both you and Mrs. Coward that in the seven school districts other than Common School District No. 57, there are only 191 children and less than 50 square miles, and, of course, this is less than the statutory requirements in forming a consolidated district.

CONCLUSION

The question of whether or not there is a Consolidated School District No. 10 now existing in Greene County, or whether Common School District No. 57 is now a part of the Willard Consolidated School District, depends upon when, as a fact, the petition for consolidation was filed with the County Superintendent of Schools and the petition for annexation was filed with the School Board of School District No. 57. If the petition for annexation was filed before the petition for consolidation, School District No. 57 is now a part of the Willard Consolidated District, and the attempted consolidation of the eight common school districts to form Consolidated District No. 10 is void, invalid and of no effect. If the consolidation petition was filed with the County Superintendent before the petition for annexation was filed with the Board of Directors of School District No. 57, then Consolidated District No. 10 is a validly organized and existing consolidated school district, and includes as part of that school district the territory formerly in Common School District No. 57.

Respectfully submitted,

C. D. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CIRCUIT COURTS
AND SALARIES:

Circuit Judge of the 26th Judicial Circuit not entitled to change of venue fee provided in Sec. 1074, R. S. Mo. 1939.

FILED

12

August 20, 1946.

830

Honorable O. O. Brown,
Judge, 26th Judicial Circuit,
Stockton, Missouri.

Dear Judge Brown:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Under senate Bill No. 442 fixing the Judges Salary which repeals certain sections and enacting new sections in their place, after reading the bill I am somewhat confused as to whether or not the Judges salary bill will keep the Judge from receiving and retaining the \$10.00 change of venue fee allowed by section 1074. Under bill 442 it does not repeal section 1074 and makes no reference to it whatever. What is your opinion on that, can the Judge still retain the change of venue fee."

Some eight sections of the Revised Statutes of Mo., 1939, are specifically repealed by SCSSB 442. However, said bill does not specifically repeal Sec. 1073 and 1074, R. S. Mo. 1939, which requires persons filing applications for a change of venue in civil cases to deposit \$10.00 with the clerk of the circuit court, and that, if change of venue is granted, the clerk of the circuit court shall transmit with the transcript the \$10.00 deposit to the clerk of the circuit court of the county wherein the cause is sent; and which further provides that the clerk of the circuit court shall pay the \$10.00 received to the Judge of the Circuit Court, or any special judge hearing the cause, upon the final disposition of such cause.

We are familiar with that well established rule of construction - that courts do not favor repeal by implication. (See State ex rel. R. Newton McDowell, Inc. v. Smith, 67 S.W. (2d) 50, 334 Mo. 653).

However, there is another cardinal rule and that is that when two statutes dealing with the same subject matter are inconsistent with each other and cannot be harmonized, the latter act will prevail and operate as a repeal of the former statute although it contains no express repealing clause.

In Young v. Greene County, 119 S.W. (2d) 369, 342 Mo. 1105, the court said:

"* * * It seems to us they are in irreconcilable conflict. If two statutes deal with the same subject matter and are inconsistent with each other, so that both cannot be operative as to such matter, the later act will be regarded as a substitute for the earlier one and will operate as a repeal thereof, although it contains no express repealing clause, State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Comm., 275 Mo. 60, 204 S.W. 395.* * *". (See also Vining v. Probst, 186 S.W.(2d) 611.)

From a careful examination of SCSSB 442, as passed by the 63rd General Assembly, we are convinced that there is an irreconcilable conflict between Section 1074, R.S.Mo. 1939, and said SCSSM 442.

Section 2 of said bill changes the compensation of judges in your county and provides that from and after the date said bill becomes effective, such judges shall receive an annual salary of Six Thousand Dollars (\$6000.00). Said section reads in part:

"From and after the effective date of this Act;
* * * and all other judges of the circuit courts
of this State shall each receive an annual salary
of \$6000.00 payable by the State out of the
State treasury."

Section 4 of said bill allows mileage and other expenses incident to holding court at any place in his circuit other than the place of residence, for judges whose circuits consist of more than one county.

Section 5 of said bill allows judges temporarily serving, transferred or assigned as judge of the circuit court, other than one to which he was appointed or elected, when said court is held in a circuit other than the circuit in which the judge resides, to receive from the state mileage and \$10.00 per day while so engaged. Under this provision, any special judge serving in a change of venue case is entitled to receive and shall be compensated \$10.00 per day while so engaged. However, this provision is not broad enough to give additional compensation to a regular judge sitting in a change of venue case, coming to his circuit from another circuit.

If it were not for Section 6 of SCSSM 442, we believe that Sec. 1074, R. S. Mo. 1939, would still be effective and the provision of said Sec. 1074 and SCSSB 442 could be harmonized. But Sec. 6 is in such clear and unambiguous language that there can be no question as to what the legislative intent was when passing said bill. Said section provides that all said salary and expenses herein provided shall constitute the total compensation for all duties performed by and all expenses of said judges, and does not stop at that, but continues by

saying that there shall be no further payment made to or accepted by said judges for the performance of any duties required to be performed by them under the law. Section 6 reads as follows:

"All of the said salaries and expenses herein provided shall be paid in monthly installments on the first day of each month and shall constitute the total compensation for all duties performed by, and all expenses of, said judges, and there shall be no further payment made to or accepted by said judges for the performance of any duties required to be performed by them under the law."

Furthermore, Section 7 of said bill expressly provides that all laws in conflict with the provisions hereof, pertaining to salaries, expenses or compensation of the judges mentioned are hereby repealed. However, such provision, as found in Sec. 7, supra, is not conclusive and the courts have held similar provisions do not amount to a specific repeal of other laws.

In view of Sec. 6, supra, we cannot see how there is room for any other construction than to hold that Sec. 1074 R. S. Mo. 1939, conflicts with the provisions of Sec. 6, supra, and, therefore, in view of the foregoing rules of construction, Sec. 1074, R. S. Mo. 1939, must be considered repealed by implication in so far as it conflicts with Sec. 6.

THEREFORE, it is the opinion of this department, that, under SCSSB 442, as passed by the 63rd General Assembly, judges of judicial circuits similar to yours are not entitled to change of venue fees as provided in Sec. 1074, R.S. Mo. 1939. Under said bill such judges shall receive an annual salary of \$6000.00, and that shall constitute the total compensation for said judges for all duties required to be performed by them under the law, except that said judges shall be entitled to additional mileage and fees when qualifying in such cases as provided for in Secs. 4 and 5 of SCSSB 442.

Respectfully submitted,

APPROVED:

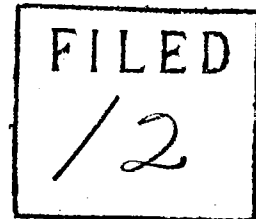
AUBREY R. HAMMETT, Jr.
Assistant Attorney-General

J. E. TAYLOR,
Attorney General

ARH/LD

COUNTY OFFICERS: The Circuit Clerk of Greene County is not
entitled to receive \$1200 compensation for
CIRCUIT CLERK: serving as clerk of the board of paroles of
that judicial circuit.

August 29, 1946



Honorable Joseph M. Brown
Prosecuting Attorney
Greene County
Springfield, Missouri

Attention: Mr. Willard S. Tucker
Assistant Prosecuting Attorney

Dear Sir:

We hereby acknowledge receipt of your letter of recent date, requesting an opinion of this department, which reads as follows:

"As a general proposition (Quoting from Givens v. Davless County, Missouri Supreme Court 1891, 107 Mo. 603 l. c. 608-9, 17 S.W. 998) 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. * * * In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his payment may be changed, or his duties enlarged without the impairment of any vested right. * * *'

"Article VII, section 13, of the Constitution of 1945 reads as follows: 'The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.'

"I do not find any constitutional prohibitions against decreasing the salary of a public officer, although Section 3 of the Schedule of the

Hon. Joseph W. Brown

(2)

Constitution of 1945 reads as follows:
'The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby.' It is a question as to whether this section can be construed to prohibit the decrease in salary of a public officer whose office is not affected by the new Constitution.

"I do not find any statutory prohibitions against decreasing the salary of a public officer.

"We will appreciate your early advice."

As we interpret your letter, the precise question asked is whether or not the General Assembly has the power to diminish the compensation of the Circuit Clerk of Greene County during his term.

Formerly the Circuit Clerk of Greene County was compensated in accordance with Section 13408, R. S. No. 1939, which provides in part:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum: * * * * * in counties having a population of seventy-five thousand persons and less than one hundred fifty thousand persons, the sum of four thousand (\$4000) dollars; * * * * *"

The 63rd General Assembly has passed two bills, House Bill No. 893 and House Bill No. 940, relating to the compensation and duties of circuit clerks in second class counties.

Section 1 of House Bill No. 893, which became effective July 1, 1946, provides:

"The clerk of the circuit court, in all counties of the second class, shall receive as compensation for his services, the sum of \$4000.00 per annum, to be paid in twelve equal monthly installments by

the county on warrants drawn on the county treasury. He shall also be allowed to retain, in addition to said annual salary, all fees earned by him in cases of change of venue from other counties."

House Bill No. 940, which also became effective July 1, 1946, repealed Section 9180, R. S. Mo. 1939, and enacted in lieu thereof a new section to be known as Section 9180, which provides:

"There is hereby created, in each judicial circuit of this state composed of a single county of the second class, a board of paroles, to be known as such, and consisting of the judges of the circuit court of the county so composing such judicial circuit. The judge of that division of the circuit court to which has been assigned, for the time being the duty of trying criminal cases, shall be ex officio chairman, and the clerk of the circuit court shall be ex officio clerk of said board of paroles. Such board of paroles is hereby empowered and authorized to consider, grant, revoke, alter, or terminate paroles and to exercise all the powers hereinafter granted and such other powers as may be provided by law."

Since House Bill No. 940 does not provide for \$1200 compensation for the circuit clerk for acting as the clerk of the board of paroles, it, in fact, reduces the circuit clerk's compensation by that amount.

It is well established that the compensation of a public officer may be increased or diminished during his term, if there are no constitutional prohibitions.

In the case of *Givens v. Daviess County*, 107 Mo. 603, the Supreme Court said, at l. c. 609:

"* * * In the absence of constitutional restrictions the compensation or salary

of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. * * * * *

Section 13, Article VII of the Constitution of 1945, prohibits increasing the compensation of the state, county and municipal officers, but there is nothing in the Constitution that prohibits the General Assembly from decreasing the salaries of such officers.

Although House Bill No. 940 still provides that the circuit clerk shall perform the duties of the clerk of the board of paroles, it is well settled that he cannot claim compensation for these duties unless he can point to a statute that provides for such compensation. Ward v. Christian County, 341 Mo. 1115, 111 S.W. (2d) 182.

It might be argued that though the Constitution of 1945 does not prevent the General Assembly from decreasing the salary of a public officer, that Section 3 of the Schedule of the Constitution of 1945 does prevent such a decrease. Said Section 3 provides:

"The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

If the above section prohibits the General Assembly from diminishing the compensation of a public officer during his term, it will be necessary to include the compensation of the officer within the meaning of the phrase "term of office."

In 46 C.J. 963, we find a definition of "term of office," which reads as follows:

"The phrase 'term of office' is one generally used to mean the fixed period of time for which the office may be held, although it is also used to designate the period for which the office is actually held."

The Missouri Supreme Court has held in accordance with the above quotation from Corpus Juris, in the case of State ex rel. Withers v. Stonestreet, 99 Mo. 361, l. c. 371 and 372, as follows:

"* * * The phrase 'term of office,' in ordinary parlance, means the fixed period of time for which the office may be held. And we have a statutory rule for the construction of statutes, requiring that, in construing statutes, 'words and phrases' shall be taken in their plain, ordinary or usual sense,' except that 'technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import.' R. S. 1879, sec. 3126.

"Going to the standards of our language, we find that a term means 'the time for which anything lasts; any limited time; the term of life.' Webster's Dict. And turning to the authorities, they announce that 'the expression, term of office, uniformly designates a fixed and definite period of time.' Anderson's Law Dict. 1023; People v. Brundage, 78 N. Y. 403, 407; Baker, Governor v. Kirk, 33 Ind. 517. So that whether we take the phrase, 'term of office,' in its ordinary or popular sense, or in its technical import, it means one and the same thing: 'A fixed and definite period of time.'

The above quotation was quoted and approved by the Supreme Court of Missouri in the case of State ex inf. Major v. Williams, 222 Mo. 268. Further, in the case of State ex rel. Rumbold v. Gordon, 238 Mo. 168, at l. c. 178, the court said:

"* * * 'The word "term" is uniformly used to designate a fixed and definite period of time. * * * * *

It seems clear to us, from the above authorities, that neither the Constitution nor the Schedule of the Constitution of 1945

Hon. Joseph W. Brown

(6)

prohibits the General Assembly from decreasing the compensation of a public officer during his term.

CONCLUSION

Therefore, it is the opinion of this department that after July 1, 1946, the Circuit Clerk of Greene County is not entitled to receive \$1200 compensation for serving as clerk of the board of paroles of that judicial circuit.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR.
Attorney General

PW:CP

TAXATION:
AND REVENUE

RE: Duties of County Collector with respect to
acceptance of tender of payment upon appraisal
items of property.

January 12, 1946

FILED

Honorable L. Madison Bywaters
Prosecuting Attorney
Liberty, Missouri

Dear Mr. Bywaters:

This will acknowledge receipt of your letter of recent date
requesting an official opinion of this department which letter
reads as follows:

"Enclosed herewith you will please find copy
of petition in case no. 16955 in the Circuit
Court of Clay County, Missouri; copy of peti-
tion in case no. 17199 filed in Circuit Court
of Clay County, Missouri; letter of December
26, 1945 from the Kansas City Power and Light
Co. to Clifford T. Halferty, County Collector
of Clay County, Missouri, and letter of Dec-
ember 28, 1945 of Clifford Halferty, County
Collector of Clay County, Missouri, to Mr.
Alan F. Wherritt, attorney for Kansas City
Power and Light Co.

"In the cases above mentioned, namely case
no. 16955 and no. 17199 the Circuit Court of
Clay County found for the relator and in each
case issued its peremptory writ of mandamus.
In case no. 16955 the peremptory was issued
on February, 19, 1944. In case no. 17199 the
peremptory writ was issued on January 8, 1945.

"The same situation is now confronting the
County Collector as was presented and decided
in the two cases heretofore mentioned. The
County Collector, as you will readily see from
his letter, has refused to accept the tender of
check of the Kansas City Power and Light Co. just
as he did in the two previous cases. It is now
the position of the Kansas City Power and Light
Co. that they are not going to petition the
Circuit Court for another writ of mandamus. In
other words they take the position that they have
made tender by check of all taxes that they feel
they are required to pay and rely on the previous

judgments rendered by the Circuit Court of Clay County to sustain them in their position.

"The County Collector would like to have your opinion as to whether or not he should accept the tender that has been made and he should also like to know that if he accepts such tender he is protected under the decisions in the prior cases decided by our Circuit Court. He is anxious to have your opinion in this regard as soon as possible for the reason that he is required to make distribution of taxes by January 15, 1946."

From your letter and the other documents attached thereto and referred to in your letter we understand your questions to relate to the validity of a tax levied by your county court for the benefit of two public water supply districts located in Clay County.

We have considered the two questions which you have propounded and we have decided that they can best be determined by the consideration of the legality of the taxes sought to be collected.

We have noted the case of State ex rel. Halferty vs. Kansas City Power and Light Company (decided September 10, 1940) 145 S. W. (2d) 100. This is a case involving a similar tax upon the same corporation under the statutes then existing relative to the authority to levy and collect taxes for the benefit of the Public Water Supply Districts. It was held that the State Board of Equalization did not have authority to apportion any part of the "distributable" property of such corporation to a public water supply district for the reason that such public water supply districts were not included within the statute authorizing political subdivisions to which such apportionment might be made.

At the time the decision was rendered in the Halferty case the statutes relating to the assessment and apportionment of the "distributable" property of electric power and light companies had been amended in the State Tax Commission under subparagraph (6) of Section 10022, R. S. Mo. 1929, and under the further provisions of Section 10023, R. S. Mo. 1929, as amended, Laws of 1933, page 422, it was provided that "taxes levied thereon shall be levied and collected in the manner as is now and hereafter provided by law for the taxation of real property in this state".

The then existing statute relating to the apportionment of such "distributable" property was Section 10022, R. S. Mo. 1929, reading, as follows:

"Said board shall apportion the aggregate value

of all property hereinbefore specified belonging to or under the control of each railroad company, to each county, municipal township, city or incorporated town in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town shall bear to the whole length of such road in this state: * * * (underscoring ours)

Under the statutes quoted, supra, the Supreme Court held in the Halferty case, in part, as follows at l.c. 122:

"(6-10) From the foregoing it appears the county court is not authorized to levy taxes upon the distributable property of railroads until the valuation thereof, as equalized and adjusted by the State Board of Equalization has been certified to it, and may then levy for municipal townships, cities and other local subdivisions only as by the statutes provided. This brings us to consideration of an insistence strongly urged by appellant, viz, that the water district should be regarded as a 'municipal township' within the meaning of these taxing statutes. It, of course, is not a county nor an incorporated city, town or village. It is denominated a 'political corporation' by the act under which it was organized. It might be termed a 'municipal corporation' in the broad sense sometimes attributed to that term. See State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S. W. 848, wherein it was held that a drainage district was a 'municipal corporation' within the meaning of Sec. 6, Art. X of the State Constitution, Mo. St. Ann., exempting from taxation the property of the 'State Counties and other municipal corporations.' In the broad sense defined (and cogently reasoned) in the Kinder case, supra, defendant might be said to be a municipal corporation. But does that mean that it is a municipal township as that term is used in the taxing statutes? A municipal township may be, for some purposes and in a broad sense, a 'municipal corporation'-- (we suggest this thought without deciding the question)--but, even if so, is a 'municipal

corporation' necessarily a 'municipal township?' It is to be borne in mind that taxing statutes are construed strictly in favor of the taxpayer bearing in mind that they should be applied with due regard to the apparent intention of the Legislature as expressed in the statute, with a view to promoting the apparent object of the legislative enactment. It will be noted that in all of the taxing provisions we have noted the words 'municipal townships' have been used. Nowhere are the words 'municipal corporations' used. Appellant says 'municipal township' is not defined by our statutes. We think its meaning, as used in the statutes we have quoted, is well understood and is clearly enough indicated as a subdivision of a county. Illustrative, we refer to Chap. 86, R. S. 1929, Mo. St. Ann. Sec. 12251 et seq., p. 8119 et seq., relating to 'Township Organization.' Sec. 12251, the first section of that chapter, provides for the holding of an election in any county for or against township organization. Subsequent sections provide for the organization, government and powers of the townships if township organization is voted. By Sec. 12259 provision is made for 'the county court of each county' to alter the boundaries of townships and to increase or diminish their number, in the manner there provided. From these and other references in the statutes that might be made we think it too clear to admit of argument that when the Legislature used the term 'municipal townships' in the statutes above referred to it meant subdivisions of a county as that term is generally understood.

"It is suggested by appellant that when Sec. 10022, providing the method of taxing railroad properties, was first enacted such 'public corporations' as defendant water district did not exist and could not be specifically referred to, and if we understand his argument, that the meaning of 'municipal township' should be extended or enlarged so as now to include such public corporations, since created. The term 'municipal townships' has been retained in the statutes. We must assume that it was purposely retained and intended to mean what it clearly does mean."

Section 10022 of the Revised Statutes of Missouri 1929, was

carried into the revision of 1939 as Section 11253. Following the decision in Halferty vs. Kansas City Power and Light Company, supra, the General Assembly in 1941 amended such statute by an act found in Laws of Missouri 1941, page 696 so that said statute thereafter read, in part, as follows:

"Said board shall apportion the aggregate value of all property hereinbefore specified belonging to or under the control of each railroad company to each county, municipal township, city or incorporated town, special road districts, public water supply and sewer districts or subdivisions except school districts in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town, special road districts, public water supply and sewer districts or subdivision except school districts in which such road is located shall bear to the whole length of such road in this state:* * *" (underscoring ours)

You will note that the statute, as it reads since such amendment, now specifically authorizes the apportionment of "distributable" property of electric light and power transmission companies to public water supply districts. Also, that such property may be subjected to taxation for local purposes appears from the provisions of Section 11295 R. S. Mo. 1939, which reads, in part, as follows:

"* * *all property, real, and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, interstate bus and truck lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.
* * *"

The authority for the incorporation of public water supply districts appears from an act found in Laws of Missouri, 1935, page 327, now appearing as Chapter 79, Article XII of the Revised Statutes of 1939. The scheme for the determination of the amount of revenue necessary for the operation of such public water supply districts and for the making of the levy upon property subject thereto in an amount sufficient to produce such revenue, appears in Section 12631, R. S. Mo. 1939.

"For the period and subject to the limitations contained in this article, the board of directors of any district organized hereunder shall, on or before the tenth day of May of each year, make estimates of the amount of taxes required to be levied to provide for the purposes of the district

as specified in Section 12624. Such estimates shall thereupon be certified by the clerk of the board and filed with the clerk of the county court or the respective clerks of the county courts of the counties in which the district is situate. Upon the basis of such estimates the county court or respective county courts shall proceed to levy a tax upon all taxable property within the district, sufficient to provide the funds required by such estimates. The clerk of the county court or respective clerks of the county courts shall enter such levies on the tax books of the county in the same manner as school district taxes are entered, for the use of the county collector. The taxes thus levied and extended upon the tax books shall be collected and the payment thereof enforced at the same time and in the same manner as is provided for the collection and payment of taxes levied for state and county purposes and such taxes, when collected, shall be remitted by the collector or collectors of the revenue, to the treasurer of the district." (underscoring ours)

We assume that all statutory steps relative to the imposition of the taxes have been timely taken as no contention contrary thereto appears either in your letter of inquiry or the copies of the correspondence attached thereto.

Upon the basis of the information submitted, and assuming but not determining, the validity of the taxes imposed for the use and benefit of Public Water Supply Districts Nos. 1 and 2, we believe that your attention should be directed to that portion of Section 11086, R. S. Mo. 1939, reading as follows:

"The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property:* * * *"

Your first question, relating to your duty to accept the tender, we believe may well be answered by reference to appellate court opinions declaring the general principles respecting your duties when such tenders are made. It is a general rule of law that a taxpayer has the right to tender payment of taxes upon certain items of property upon which taxes have been separately assessed and levied. We quote from *State ex rel. Sedalia Water Co. v. Harnsberger*, 14 S. W. (2d) 554, 1. c. 555:

"First it is claimed by the appellant that relator could not pay part of the taxes assessed against it and leave the rest unpaid.

"The general rule, as laid down in 37 Cyc. (pages 1164 and 1165), is as follows: 'But a citizen always has the right to pay the amount of any one tax listed against him while refusing to pay others or to pay taxes for a current year and contest those assessed for previous years; or to pay taxes on one piece or item of his property which is separately assessed without offering to pay the taxes on other parts.'

"The 14 items in relator's tax bill were separately assessed, item X standing by itself. The rule quoted from Cyc., according to the common practice, would apply here."

If the items for which tender of payment has been made by the Kansas City Power and Light Company are those which have been separately assessed and upon which taxes have been separately levied, then under the ruling in the Harnsberger case, cited supra, it does become your duty to accept such tender and issue receipts showing the payment thereof.

Of course, payment of taxes upon these items will discharge the liability of the taxpayer with respect to them, but such tender cannot affect a discharge of the lien for the taxes upon the other items for which tender of payment has not been made. As mentioned above, the duty still rests upon the collector to enforce the collection of unpaid taxes. We might further say that the question of tender payment of certain items is unaffected by the question of the validity or invalidity of the tax imposed by other items of the tax bill. In the Harnsberger case, supra, the validity of the tax was adjudicated, but, as the court said, this was unnecessary to the adjudication of the problem of tender of payment of separate items and was decided solely at the instance of the parties

to the action.

Your second question relates to the finality of the determination made by the decisions rendered in two prior mandamus actions between the same parties in the Circuit Court of Clay County, Missouri. It is a general rule of law that such judgments are binding only upon the immediate parties thereto and their privies; and they are final adjudications of only such issues as appear from the record therein determined and such issues as might have been determined.

It might be thought that such adjudication in the present instance would have the effect of perpetually barring the collection of taxes for the use and benefit of Public Water Supply Districts Nos. 1 and 2. In this connection we direct your attention to *In re Bruer's Income Tax*, 190 S. W. (2d) 248, where, under similar circumstances and with respect to similar contention, the Supreme Court of Missouri said:

"* * *The tax for each year is a separate and distinct transaction and each action for collection is a different cause of action from those of prior years. It would give one taxpayer an unfair advantage over others, and be unjustly discriminatory, if through inefficiency or neglect of the collecting officers, to appeal an erroneous decision on a question of law, it should be held that he would be relieved for all time from paying taxes all others must pay. * * *"

Further, such decisions as are rendered by Circuit Courts are in no circumstance binding upon the appellate courts. If in a subsequent suit it be determined that the taxes were lawfully due, you, as collector, would not be relieved from accounting for such taxes as should have been collected.

CONCLUSION

In the premises, we are of the opinion that you should accept tender of payment upon all items of property of the Kansas City Power and Light Company which have been separately assessed and upon which separate levies have been made and issue your receipt therefor. It is our further opinion that, under the statutes relating to your duties as collector, you are required to collect such other taxes together with penalties as have not been paid and which may be lawfully due.

It is our further opinion that the judgments rendered in the prior mandamus actions in the Circuit Court of Clay County between the Kansas City Power and Light Company and the collector of Clay County, Missouri, would not be finally determinative of the question of the validity of the taxes purportedly levied for the use and benefit of Public Water Supply Districts Nos. 1 and 2 of Clay County, Missouri, unless such question was adjudicated or might have been adjudicated in these actions; and that such judgments will not serve to relieve the collector of such county from his duties of enforcing the collection of such taxes if ultimately they are found to be lawfully due.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB/WFB:mw

COUNTY COURTS: County Court not authorized to
employ special counsel, with
PROSECUTING ATTORNEYS : certain exceptions.

March 27, 1946

FILED

13

H-H
Honorable Chas. B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"Some time ago I requested and received from your office an opinion as to whether in your opinion a judgment on County warrants was barred by the ten year statute of limitations if no part of the judgment had been paid. You held that the statute applied.

"Since that time the county court of this county employed an attorney to bring suit for a declaratory judgment in the name of the County Treasurer and paid this attorney two hundred dollars for his services.

"If there is anything in the statutes authorizing them to pay out county funds for this purpose I am not aware of it.

"I would like to have your opinion as to the legality of this payment."

Replying to same, will say that we construe your question to be limited to whether your County Court has authority to employ a lawyer who is not the prosecuting attorney and have him represent the county in a lawsuit that he brings to test the validity of a judgment on county warrants, which judgment

appears to be barred by the ten year statute of limitations. Further, we assume that you, as prosecuting attorney of the county, are willing, ready and able to represent the county and prosecute or defend, as the case may be, such civil actions.

The over-all picture must be before us in order to get proper conception of the public policy of the state, with reference to this question, and to do so we recite somewhat at length the case history and pertinent statutes. Beginning with the 1875 Constitution it appears that the Supreme Court of Missouri has ruled both ways on it and the law is so tangled that law writers have said, "In Missouri the court seems to be in confusion on the question." L. R. A., 1917D, page 253. There are the following cases dealing with the power of the County Court to employ outside or unofficial counsel to represent the county in civil litigation:

Thrasher v. Greene County, 87 Mo. 418 (1885);
Thrasher v. Greene County, 105 Mo. 244 (1891);
Butler v. Sullivan County, 108 Mo. 630, 18 S.W. 1142
(1891);
Reynolds v. Clark County, 162 Mo. 680, 63 S.W. 382 (1901);
Morrow v. Pike County, 189 Mo. 610 (1905);
Drainage Dist. No. 1 v. Daudt, 74 Mo. App. 579 (1898);
State ex rel. v. Affolder, 214 Mo. App. 500 (1923);
State ex rel. Becker v. Wehmeyer, 113 S.W. (2d) 1031
(1938).

In addition to the above, the following cases deal with the power of the County Court and they will be discussed hereafter:

Aslin v. Stoddard Co., 106 S.W. (2d) 472, 341 Mo. 138;
Rinehart v. Howell Co., 153 S.W. (2d) 381 (1941);
King v. Maries Co., 297 Mo. 488 (1922);
State ex rel. Buchanan Co. v. Fults, 296 Mo. 614, 247 S.W.
129 (1922).

In Thrasher v. Greene County, 87 Mo., supra, the court held, under a statute passed March 11, 1873 (Acts of 1873, page 18), that the County Court had authority to employ special counsel to assist the prosecuting attorney in a civil suit

where the county was a party. The contract in that case sued on was entered into between the attorney and the County Court on December 3, 1878. The other case of Thrasher v. Greene County, reported in 105 Mo., supra, although not decided by the Supreme Court of Missouri until 1891, was a suit on a contract between Greene County and attorneys Thrasher and Young, said contract being executed of date December 31, 1878, and a supplemental contract dated July 15, 1880. In that case the Supreme Court approved the finding that there was no fraud in the contract of employment of the attorney, and stated that the other issues were decided against the defendant "when the cause was here before. Thrasher v. Greene Co., 87 Mo. 419."

In Butler v. Sullivan County, supra, the County Court had executed a contract with attorney Butler to sue for certain railroad taxes and agreed to pay him certain specified fees. He so represented the county and then sued for the contract fees. The Supreme Court of Missouri, Division 1, denied relief and held the county was not a general agent, saying at l.c. 638 (108 Mo.):

" * * * The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

In Reynolds v. Clark County, supra, the County Court of Clark County employed plaintiff attorney to defend the county on a \$50,000 bond suit. Said attorney represented the county through the State and Federal courts to the United States Supreme Court and won the litigation there, it then being reversed from a judgment theretofore rendered in favor of the bondholders. The case being sent back for another trial, the plaintiff in this case, Reynolds, advised his client, Clark County, that the bond suit had no merit and that he was ready to continue defending the county. Shortly thereafter the County Court compromised the case and settled it for \$4,000. The county had paid their attorney, the plaintiff in the in-

stant case, \$250 and he sued the county for a balance of \$250. The county defended on the ground that it had no authority to employ this attorney. The Supreme Court of Missouri held, through Judge Sherwood, that the plaintiff attorney was entitled to his fees and upheld the contract, citing as authority Thrasher v. Greene County, 37 Mo. 419, and Thrasher v. Greene County, 105 Mo. 244.

The court, in the Reynolds v. Clark County case, made no mention of the case of Butler v. Sullivan County, above mentioned, notwithstanding the Butler case had been tried ten years before, or in 1891, and was cited in the briefs in the Reynolds case. The case of Reynolds v. Clark County would seem to be subject to attack, because that case was ruled on authority of the two Thrasher cases and the statute which was the basis for the holding in the two Thrasher cases had been repealed at the time the Reynolds case arose.

In Butler v. Sullivan County, supra, the court, after holding there is no statute conferring authority upon the County Court to employ outside counsel, said at l.c. 639 (108 Mo.):

" * * * * As conferring such authority, we are cited to an act, approved March 11, 1873, amending an act approved March 9, 1872, entitled 'An act to abolish the offices of circuit and county attorneys by adding a new section, to be denominated section 5.'

"That amendment reads as follows:

"'Sec. 5. The county court of any county in this state may employ on such terms as said court shall deem proper by an order, made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance.' The act of 1872, to which this section was amendatory, was revised and amended in 1879 (R. S. 1879, art. 2, ch. 9), and section 5 of that act omitted, and thereby the same was repealed. R. S. 1879, sec. 3160. If, however, it had not

been repealed, the power thereby granted would have no application to the case in hand.

"The civil business of the county in the transaction of which the county court was thereby empowered to employ the necessary assistance of counsel had no reference to the power of the county court when acting as the agent of the state in the matter of the assessment, levy and collection of the general revenue; but strictly to its business as a municipality, as in Thrasher v. Greene Co., 87 Mo. 419. Besides the revenue law is, in itself, a complete system prescribing service, and providing compensation for such service, and such compensation is necessarily exclusive. Hubbard v. Texas Co., 101 Mo. 210; Harris v. Buffington, 23 Mo. 53."

Again, in the case of Morrow v. Pike County, supra, the County Court had employed an outside lawyer, Mr. Morrow, to represent the county in civil litigation and agreed, by a written contract not placed of record but noted on the county records, to pay him \$5,000 attorney fees on his successful conclusion of the litigation. After he had successfully concluded the litigation he sued the county on the contract and recovered, and his recovery was sustained in the Supreme Court. However, in that case it was conceded by both sides that the County Court had authority to enter into contract employing said attorney, so it would not seem that the Morrow case determined the authority of the County Court to employ such an attorney. The court, through Judge Lamm, said at l.c. 620 (189 Mo.):

" * * * * The power of the court to contract being conceded, we are relieved from the necessity of examining into the right of a Missouri county court to make a contract for an attorney to assist its prosecuting attorney in civil business, and of construing and applying sections 4951 and 5003, Revised Statutes 1899, and of considering those cases construing the legislative

enactment (Laws 1873, p. 18) approved March 11, 1873, giving all county courts authority to hire lawyers, but which was repealed by not being included in the Revised Statutes of 1879 (Butler v. Sullivan County, 108 Mo. 639), and upon which enactment the decisions in Thrasher v. Greene County, 87 Mo. 419, and Thrasher v. Greene County, 105 Mo. 244, were based, and which cases were cited as authority for the holding in Reynolds v. Clark County, 162 Mo. 680, all of which cases are suits against counties on contracts of employment by attorneys for services."

Indeed, the above remarks might be the basis for the belief that if that power of the County Court had not been conceded, such power would have been ruled against.

In Drainage Dist. No. 1 v. Daudt, supra, the Board of Supervisors of the Drainage District employed Daudt as attorney for the district to collect the drainage taxes. He successfully handled the case, and the attorney for the county collector had tried the case in the Circuit Court and there lost it, whereupon attorney Daudt, under his employment from the County Court and after the attorney for the county collector had failed to appeal, perfected the appeal and won it in the Supreme Court. He then sued for his fees, and the county resisted it, claiming they had no authority to employ him, and the Court of Appeals sustained the county's position. The court there holds that the Board of Supervisors is a limited agent and has only such powers as conferred by statute and that the statute did not authorize them to employ attorney Daudt; that their act was ultra vires and the Board is not estopped under any circumstances. At l.c. 586 (74 Mo. App.) the court said:

"* * * * Public corporations like the respondent are not bound by the unauthorized acts of their statutory agents, and are not estopped under any circumstances to repudiate their unauthorized and illegal acts -- such acts are not the acts of the principal (the corporation). * * *"

In State ex rel. v. Affolder, supra, unofficial attorneys were employed by the County Court of Stoddard County to represent Duck Creek Township in an \$80,000 bond issue. They did so and then sued the county for \$160 for fees and recovered, because the attorney fee was part of the bond issue and was part of the costs thereof, and according to the court's reasoning, the particular statute there considered controls over the general one and no statute placed the duty on the prosecuting attorney to represent the county in that matter. The court said that neither Section 736, nor Section 738, R. S. 1919, prescribing the duty of the county attorney, nor Sections 10748 and 10750, relative to township road bond elections, nor the Township Organization Act, Section 10833, et seq., makes it the duty of the prosecuting attorney to advise the County Court as to bond issues so as to prevent employing of other attorneys as authorized by Sections 13169 and 13170.

In State ex rel. Becker v. Wehmeyer, supra, relator Becker sought to mandamus the County Court of St. Louis County to pay him \$2,000 on an alleged unliquidated contract for attorney services. The county pleaded lack of authority to execute the contract and that mandamus was not the proper remedy. The court ruled that mandamus was not the proper remedy and did not rule on the legality or illegality of the contract.

The above are the only cases that come to our mind as dealing directly with the question of the power of the County Court to employ and compensate from public funds outside counsel to represent the county in civil litigation.

Another line of cases holds that the prosecuting attorney is the proper officer to control the county litigation and that the County Court cannot deny him that right.

In State ex rel. v. Lamb, 237 Mo. 437, the Supreme Court held that the prosecuting attorney had authority to file in the name of the state proceedings to enjoin a public nuisance.

In Meador v. Texas County, 167 Mo. 201, our court held that neither the County Court nor the prosecuting attorney had sole power to determine when the prosecuting attorney was entitled to be reimbursed by the county for orally arguing criminal cases in the appellate courts, but it depends on the question of fact as to whether it was reasonably necessary.

In State ex rel. v. Wurdeman, 183 Mo. App. 23, the question arose as to whether the prosecuting attorney had authority

of his own accord, and contrary to the wishes of the county judges, to defend the county judges who were sued in mandamus to require the County Court to consider a dramshop license. Upon the return made of the judges of the County Court, the prosecuting attorney appeared and moved the Circuit Court to permit him to assume control of the defense on the ground that it was a case in which the county was interested, and therefore the statute made it incumbent upon him to do so. The Circuit Court denied this motion, as though it were competent for the county judges to exclude the prosecuting attorney with respect to the matter of the defense of that case and employ other counsel to control and manage it. The circuit judge declined to permit the prosecuting attorney to defend the case. Thereupon this mandamus suit was instituted to test the ruling of the Circuit Court.

The St. Louis Court of Appeals quotes approvingly from Kansas decisions and at page 34 states that the Supreme Court of Kansas, construing the question of the right of the county commissioners or the prosecuting attorney to control the case in court, approvingly quotes from the case of Clough & Wheat v. Hart, 2 Kan. 487, 494:

"The county attorney is elected by the people of the county and for the county. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves. The county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of

the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him.'

"The doctrine of that case was affirmed in *Waters v. Trovillo*, 47 Kan. 197, 27 Pac. Rep. 322, and has never been questioned, so far as we have been able to ascertain. Other courts either quote and approve it, or proceed in the same view on fundamental reasons."

At page 38 the court says:

"Therefore, the county being interested in the subject-matter of the mandamus suit against the judges of the county court, the statute (Sec. 1003) imposed the duty upon the prosecuting attorney to control and defend that case. His right no one can dispute, for the statute pointedly prescribes and affixes it as a duty upon him in all cases in which the county is interested, and this, too, in addition to the duties affixed by the prior section (1007) where the suit is against the county."

At page 41 the court says:

"Obviously, if it be the official duty of the prosecuting attorney under the statute to thus appear, and one which he is sworn to perform, then its performance on his part cannot depend upon the consent of the respondent county officer in the mandamus, and such county officer should not be permitted to defeat the prosecuting attorney in the performance of his official duty by withholding consent to put the interests of the county forward in his return."

At page 45 is this:

"Therefore, it appearing that it is the clear legal right of the prosecuting attorney to appear in and to control, manage, and defend the mandamus suit pending * * * against the judges of the county court as such, the alternative writ of mandamus will be * * * * * made peremptory."

That case was certified to the Supreme Court because of a dissenting opinion filed by Judge Reynolds, but the records of the Supreme Court show no further opinion written on it, but it was dismissed in the Supreme Court, perhaps because time had made the further prosecution of the suit unnecessary.

In the Wurdeman case, the court at page 32 said:

"Under the statutes both the judges of the county court and the prosecuting attorney are elected by the people of the county and with a view of serving its inhabitants in the discharge of the duties annexed by law to the respective offices of county court and prosecuting attorney. The office of the county court and of the prosecuting attorney are, of course, separate and independent and neither is necessarily subservient to the other. The county court consists of three judges, elected by the people, but its members are not required to be learned in the law, while one of the qualifications prescribed for the prosecuting attorney is that he shall be so learned. By statute, certain judicial duties and certain other ministerial and administrative duties are committed to the county court, while other statutes commit certain duties which appertain to the profession of a lawyer to the prosecuting attorney as the law officer of the county."

As stated above, the Reynolds v. Clark County case, holding squarely that the county did have authority to so employ outside counsel, seems to have most of its force taken away when it is

recalled that it was apparently ruled on the misunderstanding that the statute was still in existence at the time it had formerly been enacted and repealed. It is also difficult to understand on what reasoning the court, in the Reynolds case, could explain its failure to comment on or overrule the case of Butler v. Sullivan County, supra, decided some ten years prior thereto.

We now refer to a few cases above noted, which, while dealing with the authority or power of the County Court, we believe do not directly affect the question here before us. In the case of Aslin v. Stoddard Co., supra, it was held that the County Court had the implied power to employ a janitor for a year in advance. In Rinehart v. Howell Co., supra, it was held that the county is under obligation to pay the salary of a stenographer for the prosecuting attorney, because in the modern march of things a stenographer is necessary in the well-equipped prosecuting attorney's office and that it was the duty of the county to furnish the prosecuting attorney with the necessary office equipment. Like reasoning seemed to underlie the employment of the janitor, that is, that the County Court was charged with the duty of looking after the county property and that it was necessary for them to employ the janitor to look after it. In State ex rel. Buchanan Co. v. Fulks, supra, it was held that the county had implied power to employ another attorney when the prosecuting attorney refused to act.

The above three cases would seem to be ruled on the implied power conferred by the statute, which will be presently referred to and which placed the duty on the County Court to look after all county property. The statutory grant of power carries with it, by implication, everything necessary to carry out the power to make it effectual and complete. Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769; State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; In Re Sanford, 236 Mo. 665, 139 S.W. 376. That which is implied in a statute is as much part of it as if expressed. 59 C. J., page 973; State ex rel. v. Blair, 245 Mo. 680, 151 S.W. 148.

The case of King v. Maries Co., supra, holds that the County Court does not have authority to enter into a contract and bind the county to pay an abstracter for furnishing title certificates for tax lands. That case was ruled on the theory that the County Court is a court of limited jurisdiction and has no powers except as are conferred by the statutes. At page 496 (297 Mo.) the court said:

"It has been held uniformly that county courts are not the general agents of the counties, or of the State. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. (Butler v. Sullivan County, 108 Mo. 630; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492; Steines v. Franklin County, 48 Mo. 167.) This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. (Sheidley v. Lynch, 95 Mo. 487; Walker v. Linn County, 72 Mo. 650; State ex rel. Dybee v. Hackmann, 276 Mo. 110.)"

See also the case of Sugg v. Wisconsin Lumber Co., 283 Fed. 290, 299.

The section conferring control of county property on the County Court is Section 2480, R. S. Mo. 1939, the same being as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The above matters, unless it be the last case above referred to, appear to deal with the law as it might be interpreted if there were no statutes conferring certain statutory duties and liabilities upon the prosecuting attorneys. However, there are many statutory provisions conferring certain rights

and duties upon prosecuting attorneys, and we believe it necessary to keep those statutes in mind in order to have a complete picture of the public policy of the state, with reference to the authority of County Courts to employ outside counsel.

Without detailing many of those sections, we enumerate Sections 12947, 12948, 12949, 12950, 12951, 12962 and 12964 as amended by 1941 Session Acts, page 316; Sections 12966 and 12980, 1941 Session Acts, page 317; Sections 12990 and 12944. There are two of the above sections, to wit, 12942 and 12944, which apparently both deal generally with the prosecuting attorneys and confer upon them certain duties. Section 12942 declares:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; * * * *"

Section 12944 is as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or

counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

In *Rinehart v. Howell County*, supra, the Supreme Court, speaking of the duties of the prosecuting attorneys, said at l.c. 383 (153 S.W.):

"* * * * The duties of a prosecuting attorney are many and varied. He, among other things in addition to the prosecution of criminal actions, represents the state and county in all civil cases in his county, represents generally the county in all matters of law, investigates claims against the county, draws contracts relating to the business of the county, gives legal opinions in matters of law in which the county is interested, et cetera. Sections 12942, 12944, 12945, 12947, R. S. 1939, Mo. St. Ann. pp. 600, 602, 603, 604, Secs. 11316, 11318, 11319, 11321. * * * *"

An examination of the above statutory provisions will show that the Legislature has written a rather complete code defining the method by which counties are to be afforded legal advice and legal assistance. Regardless of whether we may think that to be a wise or unwise course, it is not for us to determine the wisdom of such a course, but it is for this office to declare what, in our opinion, is the law as it has been written in former court decisions and in statutory enactments.

Section 12947 requires the prosecuting attorney to give, "without fee," his opinion to any justice of the peace, and to any County Court, or to any judge thereof, "if required," on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer.

Section 12948 provides that if the prosecuting attorney and his assistant are interested in a case, or related, or of counsel, so they are disqualified from representing the public, then the court may appoint an attorney to prosecute or defend the case.

Section 12949 provides that if the prosecuting attorney is sick or absent, the court may appoint a person to discharge his duties, and Section 12950 provides that said appointee shall have the same power and fees as the prosecuting attorney.

Section 12951 places the prosecuting attorney subject to a fine of \$25 if he fails to attend criminal court without a reasonable excuse.

Section 12962 provides that he may have an assistant, and Section 12964 requires him to pay his assistant out of his salary.

Laws 1941, page 316, provide that certain counties having a population between 60,000 and 75,000 may have three assistants at \$200 per month salary.

Section 12966 deals with the qualifications and duties of the assistants.

Section 12980 provides that counties having a population of 45,000 to 70,000 have the power, through their County Court exercising its discretion, to "employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for their services."

1941 Session Acts, page 317, provides that in counties of a population of 200,000 to 400,000 a county counselor "shall be appointed by the County Court."

Section 12990 provides that counties of a population over 100,000 may appoint a county counselor. Section 12944 provides that such counsel may be employed to represent the county in prosecuting or defending suits for the recovery or preservation of swamp or overflowed lands, and quieting the title thereto, and to pay reasonable compensation therefor.

From the above, it will be observed that the Legislature has provided by statute for legal representation in civil and criminal litigation and that the same shall be by the prosecuting attorney, except in the instances where exceptions thereto are made in the statutes that have been passed. They have even placed a penalty upon the prosecuting attorney for his failure to attend to those duties. Evidently the Legislature has not overlooked the question of employing counsel or legal representation for the counties, because they have provided in some of the instances, as above set forth, that the county attorney may have one and in other instances more than one assistant. They have provided in certain counties, according to population, that the county may employ special counsel and pay the reasonable fees therefor. They have provided that in other counties, according to population, the county may have county counselors and they define their duties. Likewise, they have in express terms provided that the County Courts may employ outside counsel in prosecuting or defending suits, with reference to swamp or overflowed land, and quieting the titles.

However, we understand your inquiry to be not among the exceptions above pointed out, that is, your county does not come within the provisions of Section 12980 which authorizes the County Courts to appoint special counsel in counties of a population of 45,000 to 70,000, nor is your county within the provisions of the above sections referring to authority to appoint a county counselor, nor does the employment you speak of have to do with the recovery of swamp or overflowed lands, etc.

It will be noted that Section 12944, supra, states that "he shall prosecute or defend, as the case may require, all civil suits in which the county is interested." It would be difficult to conceive a broader method of stating the duties of the prosecuting attorney with reference to representing the county than the Legislature has pointed out in the above section.

The statute does not say the prosecuting attorney with the aid of such other counsel as the County Court may employ shall represent the county. It says the prosecuting attorney shall "prosecute or defend * * * all civil suits." The controlling thought as expressed by the statutes is that the prosecuting attorney (not some other and not that he along with another shall prosecute or defend) shall represent the county.

Under the well-recognized doctrine, "expressio unius est exclusio alterius," the above statutes are to be construed as excluding the performance thereof by different or other attorneys. State ex rel. Barlow v. Holtcamp, 14 S.W. (2d) 646, 1.c. 650; 50 Am. Jur., par. 244, page 238; 59 C. J., par. 582, page 984; Taylor v. Michigan Public Utilities, 186 N.W. 485, 217 Mich. 400; Taylor v. Taylor, 66 S.W. 690, 66 W. Va. 238, 19 Ann. Cas. 414; State ex rel. Campbell v. Board of Police Com'rs, 14 Mo. App. 297, 1.c. 305; State ex inf. Harvey v. Missouri Athletic Club, 261 Mo. 576, 599, 170 S.W. 904, L. R. A. 1915C, 876 Ann. Cas. 1916D, 931.

In State ex rel. Campbell v. Board of Police Com'rs, 14 Mo. App. 297, the statute provided that police officers might be removed "for cause." The court held the officer could not be removed at pleasure, saying at 1.c. 305:

" * * * It would be superfluous, to say the least, to subject the officer to 'removal by the board for cause,' if the board could remove him at pleasure, whether for cause or no cause. A very familiar maxim of interpretation excludes all idea of such an unmeaning duplication of power: Expressio unius est exclusio alterius."

Likewise the statute, by saying the prosecuting attorney shall represent the county, excludes outside attorneys from such "duplication."

Summarizing the above, it would seem that the cases of Thrasher v. Greene County, reported in Volumes 87 and 105 of the Missouri Supreme Court and above noted, were soundly ruled because they were ruled on a statute which existed from 1872 until 1879, which authorized County Courts to employ outside

counsel; that the case of Butler v. Sullivan County, supra, ruled in 1891 on a state of facts that arose when Missouri did not have any statute authorizing County Courts to employ special outside counsel, was soundly ruled disallowing that right; that the case of Reynolds v. Clark County, supra, decided in 1901, was not soundly ruled because it was based on the authority of the two Greene County cases, and the statute on which they were based had been repealed and did not exist as a basis for the ruling in the Reynolds case; that the case of Morrow v. Pike County, supra, is no authority for the employment of outside counsel because the parties there did not raise, nor did the court pass upon, that question; that the case of Drainage District No. 1 v. Daudt, supra, was soundly ruled on in denying such authority; that the case of State ex rel. v. Affolder, supra, if soundly ruled, which may be questioned, is not authority for believing that the County Court would at this time be construed as having authority to employ outside counsel; that the case of State ex rel. Becker v. Wehmeyer, supra, although having the question in it, rode off on other grounds leaving that question undecided by that court in that case; that, lastly, so far as the writer of this opinion is informed, not a one of the above cases urged as a reason why the County Court did not have such authority the well-recognized rule of "expressio unius est exclusio alterius."

It is believed that if the statute defining the powers and duties of the prosecuting attorney to be to represent the county in all county lawsuits had been properly injected into each of the above cases, kept alive, briefed and presented to the court of dernier resort, it would have been decisive and the court would have ruled the county did not have such authority to employ outside counsel.

Conclusion.

In view of the foregoing, it is our opinion that your County Court did not have the legal authority to employ outside counsel to prosecute, on behalf of your county or county treasurer, a suit for a declaratory judgment determining the

Honorable Chas. B. Butler -19-

validity of your county warrants in question, provided the prosecuting attorney was ready, able and willing to represent the County Court and the county in all proper legal matters. This is said with the understanding that the matters in controversy do not come within any of the exceptions pointed out here above, in which exceptions the law authorizes the employment of counsel other than the prosecuting attorney.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

PAROLE:

An alleged parole violator may be held for re-arrest for a reasonable time.

March 28, 1946

FILED
13

Honorable Donald W. Bunker
Director
Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

This Department is in receipt of your request for an official opinion, which reads as follows:

"The attached 'Parole and Conditional Commutation Violation Warrant' is in use by the State Probation and Parole Officers. You will note that the warrant is in agreement with 'the provisions of Chapter 48, Article 8, R.S. Missouri, 1939, and especially Section 9162 thereof.'

"The Board of Probation and Parole should like to have an opinion from you as to the length of time a parolee may be held under any and all circumstances by a Peace Officer of the State on the Parole and Conditional Commutation Violation Warrant signed and submitted by a State Probation and Parole Officer?

"I should like to cite a hypothetical case to explain how the Violation Warrant is now used. For example, the State Probation and Parole Officer in the St. Louis District receives an arrest sheet from the St. Louis Police Department each morning. This morning the arrest sheet gave the information that John Doe had been arrested after he was discovered by the police to be burglarizing a dwelling house. The St. Louis Officer thereupon issued a Violation Warrant and sent it to the Chief of Police ordering the arrest of John Doe and his

March 28, 1946

detention subject to the order of the Board of Probation and Parole. The District Parole Officer will submit a violation report and recommendation for revocation of parole in the case of John Doe to the Board of Probation and Parole. We should expect to receive the report no later than the day following the arrest. In this particular case we may anticipate the revocation of the parole on order of the Governor within a period of one week.

"Some of our rural districts in which the State Probation and Parole Officers have large areas to cover a period of thirty days lapses between the time the Violation Warrant is served, the report received by the Central Office in Jefferson City, the recommendation made to the Governor, and the revocation order received back in the Central Office of the Board of Probation and Parole. It is felt that a period of thirty days in view of the circumstances outlined in the preceding sentence would be a reasonable length of time to hold on the Parole and Conditional Commutation Violation Warrant."

Section 9162, R.S. Mo. 1939, which is a part of Article 8, Chapter 48, of the Revised Statutes of Missouri, 1939, which deals with the Board of Probation and Parole, provides as follows:

"The parole officers and other employees of the Board shall perform such duties as may be prescribed by said Board. The Board and the parole and probation officers appointed under this article shall have jurisdiction co-extensive with the boundaries of this state, and may make arrests anywhere in the state in the course of their duties under this article. Upon request of the Board

March 28, 1946

or any parole or probation officer, all peace officers of this state are authorized and required to make arrests and to hold a person so arrested subject to the order of the Board or any parole or probation officer."

(Underscoring ours.)

Section 9160, R.S. Mo. 1939, provides, in part, as follows:

"The Board of Probation and Parole shall have authority and it shall be its duty
* * * * *
to recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated.
* * * * *".

From the above statutes it will be seen that a parolee whom the Board of Probation and Parole believes has broken the conditions of his parole, may be arrested upon a warrant of the Board, and held, pending the determination by the Governor as to whether his parole should be revoked or not. The question presented by your request is, how long may the parolee be held after having been arrested, under the authority of Section 9162, supra.

This question has never been passed upon by the Courts of this state. However, the procedure under Sections 9160 and 9162, supra, for the re-arrest and return of a paroled prisoner for violation of the parole, is similar to that followed by the Federal Government. Under title 18 of the U.S. Code, Sections 717, 719 and 723 c, a Federal prisoner who has been paroled may for alleged breach of the conditions of his parole, be arrested upon a warrant issued by the Chairman of the United States Parole Board, and he is returned to a designated institution where he is entitled to a hearing by the Parole Board, as to whether he should be released, or his parole revoked. As to the length of time that such a prisoner may be held, the Circuit Court of Appeals of the 10th Circuit in Adams vs. Hudspeth, 121 F. (2d) 270, l.c. 272, said:

March 28, 1946

"The appellant cannot complain of the failure of the Board to grant a hearing within six days after his arrest on the warrant. The right to a hearing, granted by Section 719, supra, contemplates a reasonable time. MacAbey v. Klecka, D.C., 22 F. Supp. 960 and United States ex rel. Rowe v. Nicholson, 4 Cir., 78 F. 2d 468, certiorari denied, 296 U.S. 573, 56 S. Ct. 118, 80 L. Ed. 405. Clearly no such reasonable time elapsed between the arrest on the warrant and the filing of the application for the writ. * * *".

Therefore, a parolee arrested for alleged violation of the conditions of his parole may be held for a reasonable time.

What is a reasonable time depends upon the circumstances of each particular case. Smith vs. Pelton Water Wheel Co., 90 P. 934, 935, 151 Cal. 394; Salmon vs. Helena Box Company, 147 F. 408, 77 C.C.A. 586, and is such time as "a prudent man should exercise or employ in or about his own affairs." Therefore, no set rule may be laid down as to what would be a reasonable time in each case of a parolee being re-arrested for alleged violation of his parole. However, under the facts given in your request, if the District Parole Officers, the Board of Probation and Parole, and the Governor, all acting diligently and expeditiously, require from seven to thirty days in which to determine whether the conditions of a parole have been violated or not, then we believe that such period is a reasonable time, and that the alleged parole violator may be held for such a period.

CONCLUSION.

It is, therefore, the opinion of this Department that a parolee arrested under Section 9162, R.S. Mo. 1939, for an alleged parole violation, may be held for a reasonable time, and what is a reasonable time depends upon the facts in each case.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General
AMOK:ir

ARTHUR M. O'KEEFE
Assistant Attorney General

LIQUOR:

- a) Definition of "managing officer" of a corporation in licensing statute. b) A foreign corporation with resident "managing officer" of good moral character may be issued any kind of license. A foreign corporation with no resident "managing officer" may be issued a solicitor's license only.

May 17, 1946

FILED

13

5/20

Honorable Edmund Burke
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Burke:

This will acknowledge receipt of your request for an opinion on the following questions:

"Under the provisions of Section 4906, R.S. Mo. 1939: What is meant by the term 'managing officer of such corporation'? Does it mean the local manager at the place where the license is sought? Does it mean the chief manager in the State of Missouri for such corporation, and does it mean that the manager must hold some official position in the corporation, or is it sufficient that such manager is an employee only?

"Section 4906, R.S. Mo. 1939 gives me the right to issue licenses to non-residents of Missouri and foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by or through a duly licensed wholesaler within this state. Do I have the authority to issue to foreign corporations any other kind of intoxicating liquor license?"

Section 4906, R.S. Mo. 1939, provides as follows:

May 17, 1946

"No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village; * * * * Provided, that nothing in this section contained shall prevent the issuance of licenses to non-residents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by or through a duly licensed wholesaler, within this state."

(underscoring ours.)

By an official opinion of this Department, dated June 24, 1939, addressed to Honorable Walker Pierce, then Supervisor of the Department of Liquor Control, and, as later interpreted by the Supreme Court of Missouri in State vs. Hughes, 173 S.W. (2d) 877, it has been held that the "managing officer" of a corporation applying for a license to sell intoxicating liquor in any city, town or village in the State of Missouri, is not required to be a qualified legal voter of the county, city, town or village in which the corporation proposes to sell intoxicating liquor, but must be of good moral character and a qualified legal voter and taxpaying citizen at some place in the State of Missouri.

When the term "managing officer" is used in Section 4906, supra, we believe that it refers to a person who has been invested by a corporation with the control of the whole or particular part of its

May 17, 1946

business, and does not mean the chief officer of such corporation. This view is recognized in *McAllister vs. Pennsylvania Insurance Company*, 28 Mo. 214, wherein the court held that a resident agent of a foreign corporation was a "managing officer" of such corporation because it being settled that, "Such agents do in fact represent the corporation here, although, in the foreign country where the corporation has been chartered and its chief place of business is, there is another chief officer of such corporation."

A "managing officer" is defined by the Supreme Court of California in the case of *Bechtel, McCone, Parsons Corporation vs. Industrial Accident Commission*, 153 P. (2d) 331, 25 Cal. (2d) 171, as "a person in the corporation's employ, either elected or appointed, who is invested with general control at a particular place of the business of the corporation."

It was further held in *California Shipbuilding Corporation vs. Industrial Accident Commission*, 149 P. (2d) 432, 64 Cal. App. (2d) 622, that such "managing officer" may be an employee.

In the case of *The Marguerite W.*, 49 Fed. Supp. 929, the court said: "A managing officer is one to whom the corporation has committed the general management or superintendence of the whole or a particular part of its business. * * *".

Therefore, it will be seen that when the term "managing officer of such corporation" is used in Section 4906, R.S. Mo. 1939, which sets forth persons to whom a liquor license may be issued, it included the local manager at the place where the license is sought, or it may mean the chief manager in the State of Missouri for such corporation, and neither one of these persons needs to be an officer of the corporation.

The next question presented by your request is, whether foreign corporations may be issued any other kind of intoxicating liquor license other than a license for the privilege of selling to duly licensed wholesalers, and soliciting orders for the sale of intoxicating liquor to, by or through a duly licensed wholesaler within this State.

May 17, 1946

The Supreme Court of Missouri in State ex rel. Klein vs. Hughes, 173 S.W. (2d) 877, l.c. 880 held:

"* * * that the retail licensee cannot be a nonresident, but must be a voter or taxpayer of some county, town, city or village in the state where he resides."

On first impression this holding might be construed as meaning that a foreign corporation could not be issued a retail liquor license, but a reading of the facts in the opinion discloses that the holding dealt only with the qualifications of an individual licensee and the managing officer of a corporate licensee, and did not pass upon the question of whether a foreign corporation could be so licensed.

The proviso noted above was added to what is now Section 4096, in 1937 (Laws of Missouri, 1937, page 533). In the same year there was enacted a law which provided that, if any state by its liquor laws discriminated against intoxicating liquor manufactured in this State, or prohibited any manufacturer or wholesaler in this State from soliciting orders or selling to any licensed wholesaler in this State, then it would be unlawful to import or transport into this State any alcoholics manufactured in said discriminating State. (Laws of Missouri, 1937, page 536). The reason for the enactment of this anti-discrimination statute was that certain States were requiring persons licensed in their State to obtain a special license at an exorbitant fee for the right to sell alcoholic liquors manufactured outside of the licensing State (see Laws of Indiana, 1935, page 1093, imposing a \$1500 port of entry fee). In order that other States might not be able to declare under a like statute, that Missouri was discriminating against the sale of intoxicating liquors made by foreign corporations, the proviso in Section 4906 was added so that there would be no question as to any discrimination against nonresidents and foreign corporations.

With the history of the act, and the intention of the Legislature in mind, we look to the section to determine whether a nonresident corporation may be issued a retail or wholesale liquor license, or beer

May 17, 1946

license. The body of Section 4906 is restrictive in that it provides that any corporation in order to obtain a liquor license must have a managing officer who is a qualified legal voter and taxpaying citizen of this State. There are no qualifying terms attached to the word "corporation" so as to require it to be a Missouri corporation; the qualifications in the act applying to the managing officer.

While it is true as said in Brown vs. Patterson, 224 Mo. 639, 124 S.W. 1, that a proviso in a grant or enactment is something taken back from the power first declared, however, as pointed out by Judge Graves in Reagan vs. Iron County Court, 226 Mo. 79, 125 S.W. 1140: "* * * It is argued in this case that the first provision of this statute restricts the rights of the county court, but granting that to be true, the proviso, which is the later legislative expression, removes some of the restrictions." (emphasis ours.)

Our Supreme Court in the case of Castilo vs. State Highway Commission, 312 Mo. 244, 279 S.W. 673, in construing the effect of a proviso upon a restricted grant said at l.c. 677:

"* * * As the first provision of section 29 in effect limits or restricts the rights of the highway commission in laying out the routes, so the proviso, which is the later legislative expression, modifies the restriction, and consequently enlarges the power of the commission. Reagan v. County Court, supra. It is no valid objection that the proviso conflicts in part with the enactment which precedes it. Such is the very purpose and function of a proviso, and, when the restriction laid in the main part of the act is lifted by the proviso, the whole act must be read as though the restriction never existed as to the matter covered by the proviso."

* * * "

(underscoring ours.)

May 17, 1946

Therefore, the proviso removes the restriction as to the residence of the "managing officer" in so far as it relates to a "solicitor's license".

In view of what has been said above, it will be seen that, a foreign corporation may be issued any type of license provided its managing officer as defined in the first part of this opinion is of good moral character and a qualified legal voter and taxpaying citizen of some county, town, city or village in Missouri. A foreign corporation, a managing officer of which does not meet such qualifications, may still be licensed to sell to duly licensed wholesalers in this State, and solicit orders for the sale of intoxicating liquors to, by or through duly licensed wholesalers in this State.

CONCLUSION.

It is, therefore, the opinion of this Department that the "managing officer" of a corporation mentioned in Section 4906, R.S. Mo. 1939, relating to the person to whom a liquor license may be issued is a person in the corporation's employ, either an officer or an employee, who is invested with the general control and superintendence of a whole or a particular part of the corporation's business at a particular place.

It is further the opinion of this Department that, under Section 4906, R.S. Mo. 1939, a foreign corporation whose "managing officer" as defined above, is of good moral character and a qualified legal voter of Missouri, may be issued any kind of license for the sale of intoxicating liquors. A foreign corporation whose "managing officer" as defined above, does not possess such qualifications may still be issued a license to sell to duly licensed wholesalers, and to solicit orders for the sale of intoxicating liquors to, by or through a duly licensed wholesaler within this State.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

ARTHUR M. O'KEEFE
Assistant Attorney General

AMO'K:ir

ELECTIONS:

of Excelsior Springs must hold a primary election before holding a special election.

BOND ISSUES: a vacancy in the city council. The city may submit the proposition of issuing revenue bonds to a municipally owned light plant at the same time the special election is held to fill the vacancy in the city council.

May 23, 1946

FILE

13

Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri

4/3

Dear Mr. Bywaters:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this department on the following questions:

"1. In a city operating under the city manager form of government is it necessary in a special election called to fill a vacancy on the city council to have a primary election.

"2. At the time of the special election for the purpose of filling a vacancy on the council is it legally possible for such a city to also submit to the voters a proposition to vote revenue bonds for the purpose of acquiring a municipally owned electric light plant."

For convenience, we are discussing question one in a separate Part One of this opinion, and question two in Part Two of this opinion.

Part One

We think question one of your letter is answered by an examination of the following sections of the Revised Statutes of Missouri, 1939. These sections are found in Art. VIII, Chap. 38 of the Revised Statutes of Mo. 1939, dealing with elections held in third class cities having the city manager form of government.

Section 7081, R. S. Mo. 1939, providing for the city council in such cities, provides in part as follows:

"* * *Should a vacancy occur in the office of councilmen by death, resignation or otherwise, a special election shall be

called by the council in proper form for the purpose of filling the vacancy, * * *"

Section 7082, R. S. Mo. 1939, provides in part as follows:

"(1) Candidates to be voted for at all general and special municipal elections at which the officers are to be elected under the provisions of this article, shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those nominated as hereinafter prescribed. * * *"

Section 7082, R. S. Mo. 1939, specifically provides that candidates to be voted for at "all general and special municipal elections at which the officers are to be elected under the provisions of this article" are to be nominated in a primary election. The election to fill a vacancy in the council is a special election under the provisions of Art. VIII, Chap. 38, Revised Statutes of Mo. 1939, made so by that part of Section 7081 above quoted. The language of these sections is clear and unambiguous, and in our opinion, requires that the city conduct a primary election before holding a special election to fill a vacancy in the city council.

Part Two

The constitutional and statutory provisions pertinent to the discussion of question two of your letter are set out below.

Article VI, Section 27, of the Constitution of 1945, provides as follows:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the

municipality from the operation of such utility."

In the very recent case of State ex rel City of Fulton v. Forrest Smith, State Auditor, decided at the January, 1946, call of the September Term of the Supreme Court of Missouri, and not yet reported, it was held the above Constitutional provision is self-executing, that it needed no legislation to make it effective and, further, that revenue bonds voted pursuant to said constitutional provision were properly authorized in an election under Sections 7368--72 R. S. Mo. 1939. These sections are reenacted by House Bill 689 with the same provisions relative to the questions arising here, State ex rel City of Fulton v. Forrest Smith is final, there having been filed no motion for rehearing.

Section 7369, page 4, House Bill 689, provides in part as follows:

"For the purpose of testing the sense of the voters of any incorporated city, town, or village, whether organized under the general laws of this state or by special charter or by constitutional charter, upon a proposition to incur debt as authorized in the preceding sections, the council, board of aldermen or trustees, as the case may be, shall order an election to be held of which they shall give notice signed by the city clerk. * * *"

Section 7081, R. S. Mo. 1939, provides in part as follows:

"* * * Should a vacancy occur in the office of councilmen by death, resignation or otherwise, a special election shall be called by the council in proper form for the purpose of filling the vacancy, * * *"

The first legal proposition raised by question two is whether the holding of the special election to fill a vacancy on the council at the same time that an election is held to vote on the proposition of acquiring a municipally owned electric light plant is prohibited by any constitutional provision. The only pertinent constitutional provision is Section 27 of Art. VI, which is quoted above in this opinion. That section provides only that the city may issue bonds when such action has been approved "by vote of four-sevenths of the qualified electors thereof voting thereon". Thus, all that is required by the constitution is that a vote be had on the proposition, and that a certain portion of the qualified

electors voting on the proposition assent to the action. We find nothing in this constitutional provision which, in any way, prohibits the holding of another election at the same time that the bond proposition is voted upon. As a matter of fact, the cases hold that the holding of a special election on the same day as a primary or general election complies with constitutional provisions requiring an election on a special proposition "to be held for that purpose", meaning the purpose for which the special election is being held. *Morgan v. City of Los Angeles*, (1920 Cal.) 187 P. 1050; *Fox v. Seattle* (1906 Wash.) 86 P. 379; *City and County of San Francisco v. Collins* (1932 Cal.) 13 P. (2d) 912; *American Smelting and Refining Co. v. Tacoma* (1942 Wash.) 129 P. (2d) 531. The same type of provision was contained in Art. X, Sec. 12, Constitution of 1875. The new constitution changes this provision by leaving out the words "to be held for that purpose." If such elections meet the test under a provision similar to that of the Constitution of 1875, they would, in our opinion, satisfy the requirements of the Constitution of 1945. It has also been held that such elections met the constitutional requirements where the constitution required merely that an election be held. *Furste v. Gray* (1931 Ken.) 42 S. W. (2d) 889. This in effect is what is provided in the present constitution.

The second legal proposition raised is whether the holding of the two elections at the same time are prohibited by the statutory provisions above set out. If they are not, then it would appear that they could be held at the same time, since the procedure for holding each is specifically set out in the statutes, and all that is necessary is that said procedure be complied with in each case.

Strictly speaking, there are two parts of the second legal issue. One is whether the statutes relating to the voting of the bonds prevent the bond election from being held in connection with another election and two, whether the statutes regarding the election to fill the vacancy prohibits that election being held in connection with another election.

We have found no Missouri cases dealing directly with either of these points, but the language and holdings of some Missouri cases seems to indicate what would be the attitude of the Missouri court on these questions.

In *State ex rel. City of Memphis v. Hackman*, 273 Mo. 670, the Supreme Court of Missouri, in a case dealing with an election in a city of the fourth class for the purpose of voting a bond issue to acquire a municipal light plant, the court said: (l.c. 690)

"In State ex rel. Mercer County v. Gordon, 242 Mo. l.c. 624, we had occasion to make a concrete application of the foregoing canon of construction in discussing a like contention to that made by respondent in the instant case, in which we said, in effect, that the spirit of the modern rulings was not to construe laws governing special elections, as in the case at bar, with the utmost strictness, but if it appears that everything has been done to afford the voters a free and fair opportunity to vote yes or no on the proposition submitted, in the absence of the violation of a mandatory statute or the doing or omission to do something which deprives the voters of a free and fair opportunity to express their will, such an election will be upheld."

In State ex rel. Kansas City v. Orear, 210 S. W. 392, the court had before it the question of whether or not the percentage of votes necessary to approve a bond issue of the City of Kansas City, where the special election to vote the bonds was held at the same time as the general election, was sufficient. There were two bond issues voted upon. The court held a bond issue for fire protection was valid, and that a bond issue for a municipal ice plant was invalid, but the holding as to the ice plant bonds was based upon the fact that the city could not lawfully engage in the ice business. The court in the Orear case did not discuss the question of holding a special election along with a general election, but held bonds voted on at such time were valid.

The case of State ex rel. City of Marshall v. Hackman, 274 Mo. 551, dealt with the validity of an election at which bonds were voted to build or purchase an electric light plant in a city of the third class. In that case it was contended that the special bond election should have been held on a general election day, since Section 9545, R. S. Mo. 1939, provided that the special election should be held as in the case of other elections in such municipalities. Section 9545 was the same as Section 7369, R. S. Mo. 1939, which latter section has not been changed with regard to the provisions pertinent to this discussion by House Bill 689. The court in that case said: (l.c. 562)

"* * *The provision with reference to such special elections (viz. such elections shall be held and the judges thereof appointed as in case of other elections in such municipalities, R.S. 1909, Sec. 9545, *supra*) only requires similarity as to the method and manner of holding the two kinds of elections; it does not

necessarily imply that they can only be held on the same date. ****"

* * * * *

"***In cases wherein this court has passed upon the exercise of such powers, it was not thought indispensable that such elections should be held on the date prescribed by law for the general elections in such towns and cities. ***" (Underlining ours)

From the above Missouri cases we think that an election which is fair and gives the people an opportunity to vote on the issue, should be held to be a valid bond election, and that the language in State ex rel. City of Marshall v. Hackman, impliedly authorized the holding of a special election to vote municipal bonds on the same day as an election for the election of public officers of the city.

However, it is not necessary to rely solely on the Missouri authorities. Cases in other jurisdictions have directly ruled on the questions necessary to be determined in this opinion. With regard to the permissibility of holding bond elections on the same day as other elections are held, the weight of authority is that this is proper.

One of the earliest cases dealing with this question was Fox v. Seattle, (1906 Wash.) 86 P. 379. In that case the court specifically considered the question, and said: (l.c. 380)

"***This is, in effect, providing a special election for the submission of questions of this kind, and if all the requirements of a special election are met, as we understand they were met in this case, by giving proper notice, etc., the fact that for the sake of economy the election was held on the same day that a general city election was held, and that the same ballots were used, does not make it a general election, or take it out of the provision of the Constitution above quoted, viz., that such proposition must be submitted at an election to be held for that purpose; but that the election on the special proposition, being so held, is merely an incident not affecting in any manner its distinct purpose or character. ***"

This case was followed by a line of California cases in which the same question was raised. In Morgan v. City of Los Angeles, 187 P. 1050, the Supreme Court of California was called upon to decide on whether it was necessary that two-thirds of those voting on the bond issue, or two-thirds of those voting in the primary election at which the bond issue was also voted upon, was necessary to carry the bond issue. In determining this question the court rejected the consolidation of the special bond election, and said that such consolidation was authorized by a statute of California. However, the court did not base its decision upon the statute, but upon other cases, including Fox v. Seattle, supra, in holding that a primary election did not alter the nature of the bond election as a special election, and that such bond election was a valid one.

In view of this holding, it is not surprising that the California court later made the same ruling with regard to a bond election which was held on the same day as a primary election, in a case where there was no statute specifically authorizing consolidation. *City and County of San Francisco v. Collins* (1932) 13 P. 912. The court in that case said: (l.c. 914)

"* * * The second objection is that the special election called under the provisions of section 4088 of the Political Code could not lawfully be consolidated with the August primary election (see Deering's Gen. Laws 1931, vol. 1, p. 1095, Act 2264, Sec. 1), and that for the same reason it could not be held on the same date, with the same precincts. A sufficient answer is that although the elections are to take place on the same date and in the same precincts, they have not been consolidated and are not confused. Separate provision is made for inspectors, judges of election, and clerks; ballots are to be used for the special election, as distinguished from voting machines at the primary election; and the returns are to be separately canvassed. The elections are obviously distinct and separate. See *Morgan v. City of Los Angeles*, 185 Cal. 301, 187 P. 1050; *Mead v. City of Los Angeles*, 185 Cal. 422, 197 P. 65."

In the very recent case of *American Smelting & Refining v. Tacoma School Dist. No. 10*, (1942 Wash.) 129 P. (2d) the Supreme Court of Washington held that it was proper to combine a special election which dealt with tax propositions with a general municipal election. The court referred to its earlier decision in *Fox v. Seattle*, supra, and said: (l.c. 534)

"The holding of this court, in the *Fox* case, supra, with reference to the distinctive character of special elections, though held in conjunction with general elections, is supported by the general weight of authority. * * *" (Cases cited)

The reasons for the holding of the great majority of the courts, that bond elections may be held at the same time as other elections, is, we think, well stated in *State v. Dade* (1940) 198 So. 102, wherein the Supreme Court of Florida held that bond issues in such cases were valid. The court said: (l.c. 104)

"* * * Obviously, such elections were allowed to be held simultaneously because of convenience and economy, and the county commissioners are to be commended in exerting their authority thus to curtail expense and accommodate the voters. Another incentive for holding joint elections is, doubtless, the probability that one would prove a drawing card for the other and that the number of electors attracted to the polls would therefore be increased."

Other cases holding that the character of a special bond election is not changed by the reason of it being held on the same date as a general election or a primary election are: Board of Education v. Woodworth (Okla.) 214 P. 1077; Norton v. Coos County (1925 Oregon) 233 P. 864; Nyce v. Board of Commissioners of West Norriton Township (1935 Penn.) 179 Atl. 584.

With regard to the permissibility of holding special elections to elect municipal officers on the same day as other elections are held, there is less pertinent authority. However, those cases dealing with the question clearly indicate that such procedure is proper.

The facts in the case of Furste v. Gray, (1931 Kentucky) 224 Ky. 889, were very similar to the situation presented here. In that case a statute provided for a special election to fill a vacancy created in either branch of the General Assembly of the State of Kentucky. This special election was called to fill a vacancy in the office of State Senator, and the writ of election fixed the time for holding this special election on the same date as the general election. The court said: (l.c. 891)

"* * * True, the time for holding the special election may by the writ be fixed for the same day as the general election, that being in the discretion of the officer issuing the writ, but it is no less a special election, and the issuance of the writ no less prerequisite to its validity."

In Duquette v. Merrill (1935 Me.) 42 Atl. 254, the statutes again provided that vacancies in the office of County Treasurer were to be filled at the next biennial election. There was to be a primary election to nominate the candidates for the office at the biennial election. If the vacancy occurred after a regular primary election, then a special primary election was to be ordered by proclamation of the Governor. No such

regular or special primary election was held in this case. The petitioner claimed that he was duly elected County Treasurer to fill the vacancy by reason of the fact that at the biennial election his name was written on many of the ballots. The petitioner contended that the failure of the officials to hold a primary election did not nullify the right of the voters to cast their ballot, and to make their choice of a candidate to fill the office. The court considered the question of notice to the voters as being one of the questions in the case, and since a certain type of notice was required for special elections, the court first considered whether the filling of a vacancy in such case would be a special election. In that regard the court said: (l.c. 255)

"Although it was a general election that was held September 11, 1944, yet, assuming a vacancy in the office of County Treasurer, and the right and duty of the electorate to fill that vacancy at the time of the general election, yet as to such office it was a special election, as there would be no one to be elected except for the vacancy and by the provisions of the statute the election would not be for the regular term of four years but for the unexpired term of two years. That such election is held at the same time and place with the general election, does not change its character."

There is, in our opinion, no statutory prohibition against the holding of an election to fill the vacancy in the council under Sections 7081, 7082 and 7083, Revised Statutes of Missouri, 1939, for the reason that the nature of such election, as a special election, is not changed. By the above authorities it is clear that it is not changed, and this, together with the cases which we have cited dealing more particularly with bond issue elections and in which we have found no mention of any objection with the holding of elections for the selection of officers at the same time as bond elections are held, we think, clearly indicates that such elections, as to the selection of officers, may be held on the same day as a special election to vote on a bond

In summary, there is nothing in the constitution or the statutes which expressly and specifically prohibits the holding of a bond election for the acquisition of a city light on the same day as an election to fill a vacancy in the council of a city of the third class, nor prohibiting the holding of an election to fill the vacancy on the same date as a bond election. Section 7081, R. S. Mo. 1939, provides that an election to fill the vacancy shall be a special election.

The provisions of House Bill 689, relating to the voting on bond issues provides only that the bond issue shall receive two-thirds of the vote of the qualified electors voting thereon. House Bill 689 does not, therefore, provide even that the bond election shall be a special election. However, we should consider it so, under the authority of State ex rel. City of Marshall v. Hackman, supra. In both situations, the cases have held that the nature of the special election is not changed by reason of its being held on the same date of another election, and the cases have upheld the validity of elections of both types which were held on the same date as another election.

CONCLUSION

It is, therefore, the opinion of this department that (1) in a city operating under the city manager form of government, it is necessary that a primary election be held before a special election which has been called to fill a vacancy in the city council; (2) the city may legally submit to the voters a proposition to vote revenue bonds for the purpose of acquiring a municipal light plant at the time of the special election for the purpose of filling a vacancy on the city council.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

BOARD OF PROBATION
AND PAROLE:

Do not have authority to revoke a parole or conditional commutation, or to rescind the revocation thereof, signed by the Governor prior to July 1, 1946; shall pay expense of returning inmate upon revocation of parole or conditional commutation; has authority to make rules regarding final discharge from parole and only Governor can grant commutation.

July 12, 1946

FILED

13

Mr. Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an opinion, based on the following state of facts:

"On July 1, 1946, the Board of Probation and Parole will operate under the law detailed in Senate Bill 347.

"Assistant Attorney General, Jackson, is preparing new forms for the use of the Board in conformance to the new law. With respect to the new law, the Board of Probation and Parole should appreciate your legal opinion relative to the following questions:

"(1) Will the Board of Probation and Parole have the authority (after July 1, 1946) to revoke a parole or conditional commutation signed by the Governor prior to July 1, 1946?

"(2) Will the Board of Probation and Parole have the authority to rescind a revocation of parole or conditional commutation signed by the Governor prior to July 1, 1946?

"(3) With special reference to section 39, line 27, Senate Bill 347; will the Board of Probation and Parole be required to pay

the expenses of returning to the State Correctional Institutions only those parolees who have been paroled and subsequently revoked on order of the Board of Probation and Parole, or will the Board, in addition, be required to return all inmates released on conditional commutation as well as on parole even though the order of release was not signed by the Board of Probation and Parole?

"(4) Will the Board have authority to set the expiration date on parole short of the maximum or 12/12 time? For example, at present, a parolee who received a life sentence reports for five years. This is, in effect, a commutation of sentence in addition to a release from prison on parole, but it is done on a signed order of the Governor. In a similar case could the Board of Probation and Parole, after July 1, 1946, commute the sentence from life to five years from the date of release on parole? If not, the Board would have to recommend a commutation at the end of five years in order to issue a final discharge. The same situation would arise in many other cases of long sentences. (There would seem to be authority for the Board to hold a parolee on parole until the end of the maximum 12/12 time. Also, it would seem that the Board would have no authority to grant a final discharge from parole prior to the full term for which the parolee was originally sentenced.)"

We have answered the questions in the manner in which they are numbered in your request.

1. The Board of Probation and Parole does not have power, after July 1, 1946, to revoke a parole or conditional commutation signed by the Governor prior to that date. Section 9160, R.S. Mo. 1939, gave the former Board the right or power only to recommend revocation to the Governor. Said section is in part as follows:

"The Board of Probation and Parole shall have authority and it shall be its duty to * * * * recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated. * * * *"

The Board of Probation and Parole, as designated by Senate Committee Substitute for Senate Bill No. 347, Section 35A, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 8992.35A, page 191, is to carry on the duties of the Board, which was abolished, in any parole matters pending or existing as of July 1, 1946. Said Section 8992.35A is as follows:

"The board created in section 35 of this act shall be deemed to be a continuation of the board of probation and parole in existence immediately prior to the effective date of this act, and all matters pending before that board in connection with paroles of inmates at that time, or before that time, in the penitentiary or the intermediate reformatory, all pre-parole and pre-sentence investigations and all supervision services having to do with prisoners released from or eligible for commitment to said institutions, shall be carried on and completed by the board created in section 35, of this act."

Since the new Board is considered a continuation of the former Board in prior parole matters, and since the former Board had only the power to recommend revocation to the Governor, it would follow that the new Board would not have authority to revoke a parole or conditional commutation signed by the Governor prior to July 1, 1946, but only to recommend its revocation to the Governor.

2. The new Board does not have statutory authority to rescind a revocation of parole signed by the Governor prior to July 1, 1946. The law as set out under question No. 1 applies. There is, however, nothing in the new law (Senate Committee Substitute for Senate Bill No. 347) that would prevent the Board from issuing a second parole to the inmate. Section 39 of this bill gives the Board almost unlimited power and authority in granting paroles, and the pertinent part is as follows

(Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 8992.39, page 192):

"The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. * * * *"

3. As to the matter of paying the expense of returning inmates released on conditional commutation or pardon, we are unable to find any direct statutory provision as to the expense. However, we think that Section 40 of Senate Committee Substitute for Senate Bill No. 347, Missouri Revised Statutes Annotated, June, 1946 Pamphlet, Section 8992.40, page 193, is broad enough to cover this item. We further think this section would include any request by the Governor to the Board, and when the Governor requests an inmate, who had been placed on conditional commutation or pardon, to be returned to the institution, it would be the duty of the Board to apprehend and return the prisoner and to pay the expense thereof. Section 8992.40 is as follows:

"The board of probation and parole is hereby authorized and it shall be its duty to recommend to the governor for his consideration such inmates as in the opinion of the board may be eligible for pardon or commutation of sentence; or, on request of the governor, the board shall investigate and report to him with respect to any application for pardon, commutation of sentence, or reprieve."

4. In answering question No. 4, your attention is called to the following quotation from Section 39 of Senate Bill No. 347:

" * * * * A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. * * * *"

Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. * * * *"

From the above quotation we are of the opinion that the Board of Probation and Parole does not have authority to discharge a parolee from the conditions of his parole before the expiration of the terms of said parole. In other words, when an inmate is paroled he will remain under the conditions of said parole until the final expiration of the terms thereof, unless said sentence is commuted before that time by the Governor.

The only authority to grant commutations is vested in the Governor under Section 7, Article IV of the Constitution of 1945, which is as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

It necessarily follows that any commutation granted at any time to an inmate or parolee would have to be by the Governor. The Board can only recommend the commutation under Senate Committee Substitute for Senate Bill No. 347, Section 40, supra.

Conclusion.

It is the opinion of this department that the Board of Probation and Parole would not have authority to revoke a parole or conditional commutation, or to rescind a revocation thereof, signed by the Governor prior to July 1, 1946; that it is the duty of the Board of Probation and Parole to return all

Mr. Donald W. Bunker

-6-

parolees, to the proper institution, and to pay the expense thereof when a parole or conditional commutation has been revoked, whether same had been signed by the Board or the Governor; that the Board of Probation and Parole does not have authority to discharge a parolee from the conditions of his parole before the full expiration of the term of his parole, and that only the Governor has power to grant a commutation of sentence. The Board can only recommend such commutation to the Governor.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

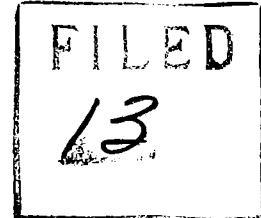
WBD:ml

TAXATION:
COUNTY COURT:

Power of county court to correct erroneous
assessments of real estate under Sections 23
and 24 of HCSHB 469.

August 12, 1946

Hon. Hilary A. Bush
County Counselor
Jackson County
Kansas City, Missouri



Dear Sir: .

We acknowledge receipt of your letter of August 5, 1946, requesting an official opinion of this office, and reading as follows:

"The County Court of Jackson County, Missouri has requested that I ask your office for an opinion on the following question.

"Section 24, HCSHB 469, signed by the Governor December 5, 1945, provides for the correction of certain erroneous assessments of real estate by the County Court. Section 11118, R. S. Missouri 1939, has been used by our County Court for this purpose but this section has been repealed. Your office gave a rather liberal interpretation some years ago relative to the powers of the County Court under the provision of Section 11118, now repealed.

"Because of the vast amount of real estate in Jackson County, only a small per cent is actually viewed by the Assessor in any one year and the valuation of other tracts is arrived at by carrying forward the figure from last year's books. In some instances substantial depreciation has taken place due to dismantling structures, fires and unusual wear and tear. These elements of depreciation are not taken into consideration by the Assessor in those instances where he merely carried forward last year's figure. Could

such an error in valuation be corrected by the County Court pursuant to the provisions of Section 24, HCSHB 469?

"If it is possible to give a general statement as to what type of erroneous assessments can be corrected pursuant to this statute we would appreciate it."

The opinions given by this office relative to the power of the county court under the provisions of Section 11118, R. S. Mo. 1939, were opinions rendered February 15, 1933, to Senator J. C. McDowell, Jefferson City, Missouri; November 24, 1934, to Hon. Walter H. Miller, County Assessor, Kansas City, Missouri; April 3, 1935, to Hon. Battle McCardle, Associate Judge, Western District, Jackson County Court, Kansas City, Missouri, and March 10, 1936, to Hon. Will H. Hargis, Prosecuting Attorney, Cass County, Missouri.

The opinion to Senator McDowell held that under the provisions of Section 9946, R. S. Mo. 1929 (Section 11118, R. S. Mo. 1939), the county court could not lower the valuation of property which the county court considered too highly assessed. The opinion rendered to Hon. Walter H. Miller held that the county court could change the assessed valuation of property, and was not limited to corrections of clerical errors. The opinion rendered to Hon. Battle McCardle held that the county court could not lower the valuation fixed by the board of equalization, and quoted from the opinion to McDowell holding the same thing. The opinion rendered to Hargis withdrew the opinion to McCardle, and held that the opinion to Miller was the opinion of the department. We believe it is the opinion rendered to Hon. Walter H. Miller that you refer to in your letter as giving a liberal interpretation of the powers of the county court under the provisions of Section 11118, R. S. Mo. 1939.

Section 11118, R. S. Mo. 1939 (now repealed), provided as follows:

"In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties there-

on, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

The opinion rendered November 24, 1934, to Hon. Walter H. Miller, held that under Section 9946, R. S. Mo. 1929 (Section 11118, R. S. Mo. 1939), the county court had power to change the valuation of property and not merely to correct clerical errors. We quote from the opinion:

"Section 9808, R. S. Mo. 1929, provides as follows:

"'Sec. 9808. County Court to Remedy Erroneous Assessments. -- The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; and where any lot of land or portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on the property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section.'"

"It will be noticed that Section 9808 above quoted is relatively similar to Section 9946,

with the exception of the last sentence of Section 9808 which we have underlined above. It seems obvious that the Legislature therefore, in omitting said sentence from Section 9946, intended Section 9808 to apply to mere clerical errors, while it intended Section 9946 to apply not only to clerical errors but also to errors of valuation with regard to the amount fixed by the assessing authority. In fact this is the only way the two sections can be reconciled without regarding one as mere surplusage, since, with the exception of the sentence above referred to, they provide substantially and in effect the same thing. It is a well recognized principal of statutory construction that in construing statutes, effect must, if possible, be given to every word, clause, sentence, paragraph and section of statute so that no part will be inoperative, superfluous or conflicting. (Dean v. Dawes (Mo. Sup.) 14 S. W. (2d) 990). Furthermore, Section 9808 appears in its identical form as Section 9197, Revised Statutes of Missouri, 1899, while 9946, then being Section 9317, R. S. Mo. 1899, applied at that time only to cities. This latter section was extended to apply to counties by an amendment in Laws 1909, page 725, the section then appearing in its present form with the exception of the 1933 amendment. We find, then, that Section 9946 in its present form was enacted subsequent to Section 9808, hence the well recognized principles of statutory construction lead us to the inevitable conclusion first, that the legislature purposely omitted the sentence in question for reasons stated above, and second, that should we assume any conflict in the sections the one subsequently enacted should prevail. * * * *

* * * * *

"In concluding, we call your attention to the actual wording of Section 9946, i.e., 'full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, etc.' The section did not say that power was given to correct any errors of

valuation which might appear on the books, but gave power to correct any errors 'of valuation.' Clearly the words 'of valuation' were used by the legislature in the abstract and full sense. Had the legislature intended to refer merely to clerical errors it would clearly have employed other wording . * * *

Section 9808, R. S. Mo. 1929 (Section 10998, R. S. Mo. 1939), quoted above, has been repealed. Section 24 of House Committee Substitute for House Bill 469 now contains the provisions dealing with the power of the county court to correct erroneous assessments, and provides as follows:

"The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes. Where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section." (Emphasis ours.)

In the case of Clay County v. Brown Lumber Co., 119 S. W. 251, 90 Ark. 413; which case has been cited by the courts in many states as correctly stating the definition of "erroneous assessment," the Supreme Court of Arkansas said:

"It is urged by the appellee that an excessive valuation of property is an erroneous assessment thereof within the meaning of section 7180 of Kirby's Digest, so that a remedy is here given to one, who has paid taxes under these circumstances, by having the taxes refunded; but we do not think that the term 'erroneously assessed,' as used in said section, refers to an overvaluation of the prop-

erty. The term 'erroneous assessment,' as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Dig. sec. 7180, give the owner a remedy for a refunding of such taxes thus erroneously paid; but a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property."

In the case of Home Owners' Loan Corporation v. Polk County, 1 N. W. 742, 231 Iowa 661, the Supreme Court of Iowa said:

"In regard to the provisions of the statute relative to the repayment of taxes claimed to be illegally or erroneously exacted or paid the following statement taken from Cooley on Taxation, Volume 3, 4th Edition, par. 1259, page 2502, is applicable.

"'Some * * * statutory enactments contain provisions which call for the refunding of taxes in those cases in which taxes illegally assessed or paid under mistake of fact, or where there has been some clerical mistake in the assessment or collection of taxes. The term "erroneously assessed," as used in such statutes, means an assessment illegal because of a jurisdictional defect and does not include a mere error of judgment in valuing the property.' (Italics supplied)."

It is clear from the definition of "erroneous assessment" contained in the cases quoted above, and the fact that it is provided in Section 24 of House Committee Substitute for House Bill 469 that "valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section," that a mere error of judgment in valuation of property by the assessor or board of equalization is not such an erroneous assessment as can be corrected under

Hon. Hilary A. Bush - 7

the provisions of House Committee Substitute for House Bill 469. The types of erroneous assessments that can be corrected under Section 24 of House Committee Substitute for House Bill 469 are assessments where the property assessed was exempt from taxation, assessments where the property is not located in the county in which assessed, assessments when the tax is invalid, assessments where the property was assessed in the name of the wrong person, assessments where the property was taxed to more than one person, assessments where the property was taxed more than once in the same year, and assessments where the valuation which was made by the assessor or board of equalization was incorrectly entered on the books as being a correct assessment. In each of these instances the valuations made do not involve an error of judgment, but involve an error because of lack of authority of law to make such assessment. In each of these instances there is a deviation from the law and not an error of judgment as to the correct value of the property.

CONCLUSION

It is the opinion of this department that the county court has no power to change the valuation placed on property by the assessor or board of equalization, under the provisions of Section 24 of House Committee Substitute for House Bill 469. The erroneous assessments which may be corrected are assessing property in the name of the wrong person, taxing the property to more than one person, taxing the property more than once in the same year, taxing land not subject to taxation, assessment of land not in the county, if the tax is invalid, and correction of clerical errors where the valuation by the assessor or board of equalization was incorrectly entered.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

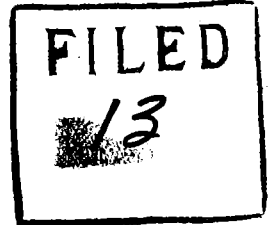
APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

OFFICERS: One person may not hold the office of recorder of deeds and city collector at the same time, nor may one person hold the office of magistrate and police judge of a city at the same time.

December 19, 1946



Honorable Robert M. Buerkle
Prosecuting Attorney
Cape Girardeau County
Exchange Bank Building
Jackson, Missouri

Attention: Mr. Raymond H. Vogel,
Assistant Prosecuting
Attorney

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department, reading as follows:

"On May 1st, 1945, Arthur Schade after being duly elected took office as the City Collector of Jackson, Missouri, a city of the fourth class. The term of this office expires May 1st, 1947. In the general election on November 5th, 1946, Mr. Schade was elected to the office of Recorder of Deeds of the County of Cape Girardeau. This term will begin January 1st, 1947. Therefore, unless his entering upon the duties of the latter office causes a vacancy in the office of the City Collector Mr. Schade will hold both offices from January 1st, 1947, to May 1st, 1947. Inasmuch as the heaviest collections made by the City Collector of Jackson, Missouri, are made just prior to January 1st it would be preferable from the standpoint of the City of Jackson if the present City Collector could hold the City Collector's office

until the new City Collector is elected.

"Clyde Baugh was elected Police Judge of the City of Jackson, Missouri, on May 1st, 1945, and his term as such Police Judge expires May 1st, 1947. On November 5th, 1946, Mr. Baugh was elected Magistrate of the County of Cape Girardeau. He will enter on the duties of this office January 1st, 1947.

"I have been unable to locate any constitutional or statutory prohibitions against the simultaneous tenure in the two cases above described. However, it appears that there is a general rule against the holding of 'incompatible offices' at the same time. The question as to which are 'incompatible offices' appears to be involved here."

The first question we will consider in this opinion is whether or not a person can serve as police judge of the City of Jackson and Magistrate of Cape Girardeau County at the same time.

Section 3 of Senate Bill 207 of the 63rd General Assembly, provides in part as follows:

"* * * No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

We assume that the police judge of the City of Jackson receives compensation. With this in mind, and in view of the above provision of Senate Bill 207, one person could not serve as police judge and magistrate at the same time.

You have also presented the question of whether or not one person may hold the job of recorder of deeds of Cape Girardeau County and city collector of the City of Jackson at the same time.

There are no statutory or constitutional provisions prohibiting a person from holding these two offices. However, the

common law rule is that if two offices are incompatible a person may not hold said offices at the same time. A leading case in Missouri on this point is State ex rel. Walker v. Bus., 135 Mo. 325, wherein the court stated at l. c. 339:

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. *"

We are unable to find anything inherently inconsistent in the functions of these two offices, and therefore the holding of said offices by one person would not violate the common law rule. However, Section 12828, R. S. Mo. 1939, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

In a proceeding brought under the above section by the Prosecuting Attorney of Pike County to remove the sheriff from office, the Supreme Court in the case of State v. Yager, 250 Mo. 388, stated at l. c. 403:

"* * * It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909),

unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom. * * *

You have stated in your letter that the City Collector makes his heaviest collections just prior to January 1st and for this reason we assume the City Collector would be performing very heavy duties in the next few months. We believe this would necessitate that he spend most of his time performing the duties of city collector and would cause him to be absent from his office of recorder of deeds. This, in our opinion, would not be personally devoting his time to the performance of his duties as recorder of deeds as required under Section 12828, supra. It is our belief that he should be in his office during regular office hours, unless he absent himself for a lawful reason, so that he could serve the public whenever they request such service.

CONCLUSION

It is, therefore, the opinion of this department that a person may not hold the office of Recorder of Deeds of Cape Girardeau County and City Collector of the City of Jackson at the same time, and it is further our opinion that a person may not hold the office of Magistrate of Cape Girardeau County and Police Judge of the City of Jackson at the same time.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

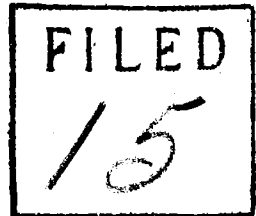
J. E. TAYLOR
Attorney General

PW:EG

DEPARTMENT OF PUBLIC HEALTH
AND WELFARE:

Appeals under Sec. 9411 R. S. Mo.
1939, shall be made to the Director
of Public Health and Welfare under Sen-
ate Bill No. 349.

August 17, 1946.



Mr. Proctor N. Carter, Director
Division of Welfare,
State of Missouri,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an opinion. Restating your request, for the sake of brevity, you inquire whether an appeal under Sec. 9411, R. S. Mo. 1939, from the decision of the Administrator of the State Social Security Commission shall be made to the Director of the Department of Public Health and Welfare, or the Director of the Division of Welfare, under Senate Bill No. 349 passed by the 63rd General Assembly of the State of Missouri.

Section 9410, R. S. Mo. 1939, provides that the Administrator of the State Social Security Commission, or someone designated by him, shall decide whether an applicant is eligible for benefits under the State Social Security Act, upon said applicant filing his application for such benefits.

Section 9411, R. S. Mo. 1939, grants the applicant for benefits under the State Social Security Act the right to appeal from the decision of the administrator to the state commission. There can be no question but that such an appeal under the State Social Security Act goes to the state commission. That commission is referred to many times in Sec. 9411, supra, as the proper party to appeal to and determine the questions presented by said appeal; and it further provides for an appeal from the decision of the state commission to the circuit court.

The two sections to be construed in answering your request are Secs. 31 and 32 of Senate Bill No. 349, as passed by the 63rd General Assembly, and their provisions read in part:

"Section 31. All powers and duties heretofore under control and administration of the state social security commission and the offices thereof shall hereafter be under the control and administration of the state department of public health and welfare and shall be assigned to the division of welfare within the department,

together with all other powers and duties which may herein or hereafter be so assigned. In all laws of Missouri, wherever the term state social security commission or state commission used in such connection shall occur, the term department of public health and welfare shall be substituted and understood; and wherever the term commissioner in such connection shall occur, it shall be understood to mean the director of the division of welfare; the term person shall include corporation, partnership or association; state agency as that term may be used in any federal act and not otherwise specifically provided for by state law shall mean the department of public health and welfare; the singular shall include the plural and the masculine shall include the feminine.

"Section 32. The division of welfare as an integral part of the department of public health and welfare shall be vested with and shall exercise all the powers and duties necessary to enable it to carry out fully and effectively the purposes enumerated in this act or in amendatory acts, and shall be the state agency to administer state plans and laws involving: pensions or assistance to persons over sixty-five years of age, who are incapacitated from earning a livelihood or are without means of adequate support; * * *."

Under Senate Bill No. 349, as passed by the 63rd General Assembly, the Legislature created the Department of Public Health and Welfare, and under that department the Division of Welfare.

Under Sec. 31 of Senate Bill No. 349, supra, it provides that state agency, as used in any federal act and not otherwise provided by state law, shall mean the Department of Public Health and Welfare. However, under Sec. 32 of the same act, the Division of Welfare is made an integral part of the Department of Public Health and Welfare, and further provides that the Division of Welfare shall be the state agency to administer state plans and laws involving pensions to the aged, dependent children, relief, etc. From reading the foregoing provisions, one might conclude that, since the division of welfare is made by state law the state agency to administer state plans and laws involving pensions, the Director of the Division of Welfare is the proper officer to appeal to and pass upon appeals by applicants for benefits under the State Social Security Act. This might be true if it were not for other provisions in Sec. 31, Senate Bill No. 349, supra, which transferred all powers and duties heretofore under the control and administration of the State Social Security

Commission to the State Department of Health and Public Welfare and further requiring that, whenever the term state commission is used in any law of Missouri, the term Department of Public Health and Welfare shall be substituted.

Since both Secs. 31 and 32 of Senate Bill No. 349, supra, were enacted at the same time, we cannot apply that rule of statutory construction so often relied upon that in case of a conflict the latter enactment shall prevail.

One of the cardinal rules of statutory construction is to give effect to the legislative intent, as expressed therein (See America Bridge Co. v. Smith, 179 S.W. (2d) 12, 352 Mo. 616). There is also a well established rule of statutory construction - that courts should try to give a sensible construction - one that would lead to an absurd construction should be avoided.

In Donnelly Garment Co. v. International Ladies' Garment Workers, 99 Fed. (2) 309, the court said:

"It is a well established rule that all laws are to be given a sensible construction, and that a literal application of a statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given to the statute consistent with the legislative purpose. (See cases cited.)"

It is also well established that in construing statutes, the courts should consider the object of such legislation, and the evil it sought to remedy. The court may also consider the expediency of law in ascertaining legislative intent. (See Warrington v. Babb, 56 S.W. (2d) 835, and Memmel v. Thomas, 181 S.W. (2) 168.

Following the foregoing rules of statutory construction, we are of the opinion that the appeal hereinabove referred to should be made to the Department of Public Health and Welfare and that said Director should decide all questions presented by said appeal.

Under Secs. 9410 and 9411, supra, the administrator of the State Social Security Commission originally passed upon the qualifications of all applicants for benefits and fixed the amount of benefits each applicant was entitled to receive. Anyone aggrieved by his action could appeal to the State Commission. If the law had required said appeal to be made to the State Administrator, that would have been unfair to the applicant for the reason that in so doing it would permit the administrator to pass upon his former decisions, and that would be too much like being the prosecuting attorney, jury and judge.

To require that appeals under Senate Bill No. 349 be made to the Director of Public Welfare, who, under the law originally passed upon the qualifications of said applicants, would be permitting him to pass upon his former decisions, and it is the opinion of this department that that would be an unreasonable construction to say that the Legislature, in passing Senate Bill No. 349, supra, intended that the Director of Public Welfare should, on appeal, pass upon his former action.

Therefore, since Sec. 31 of Senate Bill No. 349, supra, specifically transfers all authority vested in the State Commission to the Department of Public Health and Welfare, it is the opinion of this department that appeals granted under Sec. 9411 R. S. No. 1939, should be made to the Director of the Department of Public Health and Welfare and that officer should render judgment on said appeal in conformity with Sec. 9411, supra,

Respectfully submitted,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney-General.

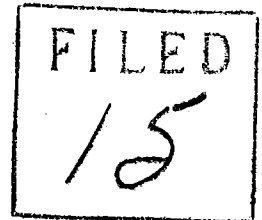
ARR/LD

LABOR DEPARTMENT: Division of Employment Security may submit their plan of operation for the Missouri State Employment Service to the Secretary of Labor of the United States.

November 18, 1946

Mr. Michael J. Carroll, Director
Division of Employment Security
Department of Labor and Industrial
Relations
Jefferson City, Missouri

11/18



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this Department in regard to submitting your plan of operation for Missouri State Employment Service, under date of November 1, 1946, to the Secretary of Labor of the United States for approval.

We have examined the Constitution and Statutes of this State and the documents incorporated in the plan of operation for the Missouri State Employment Service, effective November 16, 1946. We are of the opinion that the Division of Employment Security is authorized to submit this plan and to administer the Missouri State Employment Service in accordance with the provisions of the Wagner-Payser Act (Act of June 6, 1933, 29 U. S. Code 49) as amended, Title 4 of the Servicemen's Readjustment Act of 1944 (Act of June 22, 1944, 38 U. S. Code 693) as amended, and the pertinent provisions of the Labor Federal Security Appropriations Act 1947 (Public Law 545, 79th Congress 2nd Session).

Respectfully submitted,

BERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

COUNTY COURTS: Right to purchase lands sold under school fund mortgages.

February 14, 1946

FILED

16

Honorable G. R. Chamberlin
Prosecuting Attorney
Harrisonville, Missouri

Dear Sir:

This office is in receipt of your request for our official opinion on the following question:

In 1937 the County Court of Cass County purchased at a foreclosure sale under a school mortgage certain land for the sum of \$600.00. The County Court has subsequently sold a portion of the property and received some income amounting to a total sum of \$850.78, leaving a deficit in the original mortgage of \$1149.42. The County Court now desires to acquire for road purposes a large amount of stone located on the portion of the property remaining under custody of the County Court. In what manner may this stone be lawfully acquired in order that the school fund be properly protected?

Section 8486, R. S. Mo. 1939, empowers the various counties of the state to purchase or acquire by right of eminent domain gravel pits, quarries, and lands for other types of building material.

Section 10389, R. S. Mo. 1939, authorizes the various county courts of the state to purchase land sold under foreclosure of school fund mortgages in order to properly protect the school fund. That section is as follows:

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the

payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

This section obviously places the county court in the position of trustee of the property purchased for the benefit of the school fund. That being true, the county court may not directly purchase the property from itself as trustee without subjecting itself to a possible action to set aside the sale.

In *Guy v. Mayes*, 235 Mo. 390, a purchase by a trustee of the property in his charge was under discussion, and the court, in condemning this transaction, stated, l. c. 398:

"The law looks with great disfavor upon purchases by trustees of the trust property in their charge; and upon a direct attack, will set aside such transactions upon slight proof

of fraud, deception, unfairness or over-reaching. However, the purchase by a trustee of trust property is not void, but only voidable at the instance of the injured party or someone standing in his shoes. (Richards v. Pitts, 124 Mo. 602; State ex rel. v. Jones, 131 Mo. 194; Burford v. Aldridge, 165 Mo. 419.)"

It seems to us that the original mortgagor, or possibly the sureties on the bond which was undoubtedly required at the time the original loan was made, might be in a position to attack the sale of the property to the county by the county court. We believe that the county court should dispose of this property at public or private sale, as directed by Section 10389, and then proceed to condemn or purchase the necessary stone for the required road building purposes, as provided in Section 8486.

CONCLUSION

It is, therefore, our conclusion that the County Court of Cass County may properly obtain the stone located on school lands held by it as trustee by (1) selling said lands to a bona fide purchaser and thereafter contracting for the purchase of said lands or the stone thereon, or (2) exercising its right of eminent domain on the desired portion of said property after a bona fide sale if a purchase price could not be agreed upon with the owner.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

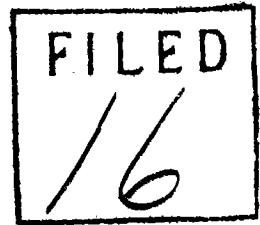
APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

MOTOR VEHICLES: Operating vehicle in Missouri registered under the Dealer's and Manufacturer's Law of Kansas; necessity of chauffeur's license of person operating such vehicle.

June 21, 1946



7/5

Mr. C. H. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This department is in receipt of your recent letter requesting an opinion based upon the following facts:

"I would appreciate your valued opinion on the following:

"1. If a man who operates a Garage in Kansas was coming over into Missouri to pick up wrecked cars and the only license he has on his wrecker is a dealer's license for Kansas, would the case be subject to prosecution by the Courts in Missouri, and if so, what would be the proper charge against the operator of the truck bearing a Kansas Dealer's License and using the truck as a wrecker and for towing wrecked cars back from Missouri to Kansas.

"2. If the operator of such truck did not have any Kansas Chauffeur's license and no Missouri Chauffeur's License would he be subject to prosecution in the State of Missouri on a charge of failing to have the proper Chauffeur's license."

Answering question No. 1, we refer to Section 8-136 of the General Statutes of Kansas 1935, providing for the registering of motor vehicles by manufacturers and dealers, and

which, in part, is as follows:

"A manufacturer of or dealer in motor vehicles, trailers or semitrailers, demonstrating, displaying or exhibiting any such vehicle upon any highway in lieu of registering each such vehicle, may obtain from the department, upon application therefor upon the proper official form, and payment of the fees required by law, and attach to each such vehicle two plates, which shall bear thereon a distinctive number, also the name of this state, which may be abbreviated, and the year for which issued, together with the word 'dealer' or a distinguishing symbol indicating that such plate or plates are issued to a manufacturer or dealer, and any such plates so issued, may during the calendar year for which issued, be transferred from one such vehicle to another owned or operated by such manufacturer or dealer, when such vehicle is being used primarily as a demonstrator, or is being displayed or exhibited, or is being used as a so-called service car, and at no other time or for no other purpose shall such plates be used. * * *"

As can be readily observed, the Kansas Statute permits the operation of a service car by a dealer or manufacturer when a dealer's license is displayed thereon, so that the operation of a motor vehicle, as described in your request for an opinion, would be proper in Kansas when the same was registered under a dealer's license.

Both Missouri and Kansas have reciprocity statutes governing the operations of motor vehicles. Section 8-138 of the General Statutes of Kansas 1935, provides the State of Kansas shall grant reciprocity to other states in the following manner:

"(a) A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, country or other place of which the

owner is a resident, and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fees to this state. * * * * Provided, That any exemption granted in this section to non-residents shall apply to motor vehicles owned by nonresidents only to the extent that the laws of the state in which such owner resides guarantees like exemptions and privileges to motor vehicles owned and operated by residents of Kansas, or to the extent that the proper authorities of the state in which such owner resides grant exemptions or reciprocity of privileges to motor vehicles owned and operated by residents of Kansas: Provided further, That all officers in the state of Kansas charged with the enforcement of this act shall grant to all nonresident owners of motor vehicles privileges of operation within this state equal to the privileges granted in such foreign states to motor vehicles owned and operated therein by residents of Kansas. * * * *

Section 8575, Mo. R.S.A., grants reciprocity by law to other states in the operation and licensing of vehicles, and is as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this

state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

An examination of the reciprocity statutes of these two states clearly indicates an intent to fully recognize the licensing and registration of motor vehicles under a dealer's and manufacturer's provision.

As to question No. 1, it is the opinion of this department that since the State of Kansas permits the operation of a service car under a dealer's registration, the operation of such vehicle in Missouri would be proper under the general reciprocity statutes hereinbefore quoted.

Question No. 2 refers to the requirement of a chauffeur's license for the operator of the vehicle described in your request. Section 8-201 of the General Statutes of Kansas 1935, defines the term "chauffeur" as follows:

"'Chauffeur.' Every person who is employed for the principal purpose of operating a motor vehicle, and every person who drives a motor vehicle while in use as a public or common carrier of persons or property: Provided, that this classification shall not apply to any person operating a truck used in the transportation of farm products from point of origin to market."

Section 8-202, General Statutes of Kansas 1935, enumerates persons required to have a license, and is as follows:

"No person except those expressly exempted under the provisions of this act shall drive any motor vehicle upon a highway in this state unless such person upon application has been licensed as an operator or

chauffeur by the department under the provisions of this act."

Section 8-203, General Statutes of Kansas 1935, enumerates persons exempt, and is as follows:

"(a) No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery, or any farm tractor or implement of husbandry temporarily drawn, moved or propelled on the highways. (b) Every person in the service of the army, navy or marine corps of the United States, and when furnished with a driver's permit, and when operating an official motor vehicle in such service, shall be exempt from license under this act."

Section 8367, R.S.A. Mo., defines the term "chauffeur" as follows:

"'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire."

Section 8372, R.S.A. Mo., requires that every person desiring to operate a motor vehicle as a chauffeur shall first obtain a chauffeur's license.

Under the requirements and definitions of both Missouri and Kansas statutes the operation of said service car would require the procuring of a chauffeur's license.

As to question No. 2, it is the opinion of this department that the operation of the service car, described in your

request for an opinion, in the state of Missouri by a resident of Kansas, without having procured a chauffeur's license from either Kansas or Missouri, would be a violation of the Missouri statute requiring said operator to have a chauffeur's license.

Conclusion.

It is, therefore, the opinion of this department that the operation of a service car in Missouri, registered under the Kansas dealer's and manufacturer's provision, by a resident of Kansas would not be a violation of the laws of Missouri. It is our further opinion that the person operating said vehicle in Missouri would be required to have a chauffeur's license from either Missouri or Kansas, and the failure to have such chauffeur's license would be a violation of the laws of Missouri requiring said operator to have such chauffeur's license.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

LIQUOR CONTROL: (1) 3.2% nonintoxicating beer may not be sold to minors;
(2) 3.2% nonintoxicating beer may be sold on Sunday but Sec. 4742, R. S. 1939, may be invoked against the act of selling same.

October 28, 1946

FILED

16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

Your letter of recent date, which reads as follows:

"The question has been raised in this county about the sale of 3.2% beer on Sunday. Also of the question of sale to minors of 3.2% beer.

"The second question seems to be fully answered in House Bill No. 108 of the 63d General Assembly of Missouri which plainly says that non-intoxicating beer shall not be sold to minors.

"I have not found any bill of the 63d General Assembly which covers the question of the sale of 3.2% beer on Sunday.

"Section 4742 Revised Statutes of Missouri, 1939 is broad enough to cover about everything, and I am wondering if that Statute can be invoked against the selling of 3.2% beer on Sunday.

"And also Section 4891 provides against the selling of intoxicating liquor on Sunday.

"In State v. Barnett, 111 Mo. App. 688, the court holds that a person who was

prosecuted for selling liquor without a liquor license may have been successfully prosecuted under the Sunday law section.

"The road houses and beer selling places are getting out of hand and this gives the officers considerable trouble."

presents three questions: One, whether or not the statutes of this state forbid the selling of 3.2% nonintoxicating beer to minors; secondly, whether or not there is any direct prohibition in the statutes against the sale of 3.2% nonintoxicating beer as such on Sunday; and, thirdly, whether or not Section 4742, R. S. Mo. 1939, can be invoked against the selling of 3.2% nonintoxicating beer on Sunday.

Limiting our answer to those specific questions, which we believe are presented in your letter, in the resolution of the first question listed above, we find Section 4995A, Laws of Missouri, 1945, effective July 1, 1946, provides as follows:

"No person or his employee shall sell or supply non-intoxicating beer or permit same to be sold or supplied to a habitual drunkard or to any person who is under or apparently under the influence of alcoholic beverages. Non-intoxicating beer shall not be given, sold or otherwise supplied to any person under the age of twenty-one years, but this shall not apply to the supplying of non-intoxicating beer to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said non-intoxicating beer to said person by a physician."

It is apparent from that section that the sale or supply of nonintoxicating beer to a person under the age of twenty-one years is prohibited with, however, the express exceptions contained in the provisions of the statute.

In answer to the second question, there is nothing in the statutes of Missouri directly prohibiting the sale of

3.2% nonintoxicating beer as such on Sunday. However, Section 4995, Missouri R. S. 1939, prohibits the sale of nonintoxicating beer between certain hours of the day. Said section provides as follows:

"No person having a license under the provisions of this Act, shall sell, give away or otherwise dispose of, or suffer the same to be done, upon or about his premises, any nonintoxicating beer in any quantity between the hours of one-thirty o'clock A. M., and six o'clock A. M., and any person violating any provision of this section shall be deemed guilty of a misdemeanor and shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine of not less than Fifty Dollars (\$50.00) nor more than One Thousand Dollars (\$1000.00) or by both such fine and jail sentence."

In other words, there is nothing in the Liquor Control Act which either expressly or impliedly prohibits the selling or supplying of 3.2% nonintoxicating beer as such on Sunday.

This leads to your third question, which presents the proposition as to whether or not Section 4742, Mo. R. S. 1939, can be invoked to prevent the sale of 3.2% nonintoxicating beer on Sunday. Section 4742, Mo. R. S. 1939, provides as follows:

"Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars."

The specific answer to your third question is found in a Springfield Court of Appeals case, handed down January 11, 1946, and reported in 192 S. W. (2d) 68, State v. Hattie Malone.

In that case the defendant was convicted, under Section 4742, Mo. R. S. 1939, of selling 3.2% nonintoxicating beer on a Sunday. On appeal, the Springfield Court of Appeals affirmed the conviction of the lower court and sustained the prosecuting attorney's invocation of Section 4742, Mo. R. S. 1939, under which the information in said case was drawn and the conviction obtained. In the course of the opinion, the court said:

"* * * * *

"The object of Section 4742 is to enforce a cessation from labor on one day in seven in order to promote the health, peace and good order of society. The fact that the same day is also observed as a day of rest and devotion by the members of many religious organizations does not make such statute a religious regulation or duty. It is a valid exercise of the police power of the state. * * *

* * * * *

"Section 4742 does not condemn the sale of fermented liquors because they contain or do not contain alcohol, or because they are intoxicating or non-intoxicating. It is the sale on Sunday that is condemned, because that day is designated by statute as a day of rest. A sale of tobacco (State vs. Ohmer 34 Mo. App. 115) is as much a violation, under this statute, as the sale of a gallon of alcohol. Merely to keep a dramshop open on Sunday without any sales or intent to sell violates this statute, City of Louisiana vs. Anderson, 73 S. W. 875, 100 Mo. App. 541. A 'liquor' may be intoxicating or nonintoxicating (Webster's International Dictionary, Funk & Wagnall's New Standard Dictionary) and where that word is used in a statute, it does not necessarily exclude nonintoxicating beverages or liquors. * * *

* * * * *

"There is as much labor involved in selling a bottle of buttermilk (which by the way is a fermented liquor) as there is in selling a bottle of intoxicating or nonintoxicating beer. The act of selling and not the quality of the article sold is the thing Section 4742 condemns.

"* * * Clearly the purpose of this enactment was to control by licensing, and other wise, those who deal in this commodity at all hours on all days, * * But a license does not permit one to sell on Sunday. State vs. Ambs, 20 Mo. 214. Lambert vs. State 3 Mo. 492. The privileges secured by a license do not include the right to disregard any valid existing law. * * *

* * * * *

"We believe that each of these statutes can still be given force and effect without violence to either and that Article 2 of Chapter 32 does not, by implication, repeal Section 4742. * * *"

(Underscoring ours.)

It is apparent from the above quoted decision that the section of the statutes, Section 4742, Mo. R.S. 1939, is directed, not at the selling of intoxicating or nonintoxicating liquor, but, as the court so clearly states, is directed at the act of making the sale, that is, the labor involved in the consummation of the exchange of commodities or objects on a Sunday. Other cases hold that a license to sell spirituous liquors does not authorize persons so licensed to sell after 9 o'clock on Sunday morning, contrary to the provisions of the act concerning crimes and punishment, R.S. Mo. 1835, page 209, Article 3, Chapter 31, Lambert v. The State, 3 Mo. 492; Colun v. The State, 3 Mo. 493; Brud v. State, 3 Mo. 496. There seems to be sufficient authority for the invocation of Section 4742, Mo. R. S. 1939, against the act of selling 3.2% nonintoxicating beer on Sunday, but keep in mind that Section 4742 is not directed at either intoxicating or nonintoxicating beer,

but is directed, under the decision of the Court of Appeals, cited and quoted from supra, at the act of selling, not at the object sold.

Conclusion

Under the authority cited, supra, it is the opinion of this department that 3.2% nonintoxicating beer is prohibited from being sold to minors by reason of Section 4995A, Laws of Missouri, 1945. Secondly, that there is no restriction in the Liquor Control Act against the sale of 3.2% nonintoxicating beer as such on Sunday. Thirdly, that Section 4742, Mo. R. S. 1939, may be invoked against the selling of 3.2% nonintoxicating beer on Sunday when it is directed at the act of selling, and not at the object sold.

Respectfully submitted,

WM. C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:EG

SHERIFF:

COUNTY COURT:

Sheriff cannot enter into agreement with county court whereby the sheriff's family would be furnished their groceries as reimbursement for feeding prisoners.

July 30, 1946

FILED

17

8/2

Honorable Jonathan E. Clarke
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Clarke:

General Taylor wishes to acknowledge receipt of your recent letter requesting an opinion from this office, which request is as follows:

"Under the Old Constitution, the Sheriff's wife in a County of less than 30,000 population was paid for cooking and furnishing meals to prisoners.

"Under the New Constitution, the Lincoln County Court proposes to buy all groceries for prisoners and the Sheriff's immediate family and in return the Sheriff's wife will then cook for the prisoners on her own cooking equipment without charge.

"Will you please advise if the foregoing agreement would be legal?

"In view of the fact that we are now without any arrangement for providing meals for our prisoners, an early reply will be appreciated."

By reason of the adoption of the new Constitution, it has been necessary to amend many of the laws of the state; and, to properly answer your question, it will be necessary to cite certain sections of the Constitution and of the new laws.

Section 3, Article VI, of the Constitution, requires counties to be classified in four classes, and the Legislature, following this constitutional provision, has enacted Committee Substitute for House Bill No. 476, approved December 5, 1945. Referring to Section 1 of this bill, we find that all counties having an assessed valuation of \$10,000,000.00 and less than \$50,000,000.00 shall be in the third class. Section 2 of the bill provides that, for the purpose of determining the initial class in which a county belongs, the assessed valuation as set forth on pages 333 to 400 of the "Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944," shall be used. This journal reveals Lincoln County, at that time, had an assessed valuation of \$16,611,338.00, and is therefore a county of the third class.

The Constitution of 1945, Section 13, Article VI, provides that all state and county officers, except constables and justices of the peace, charged with the investigation, arrest, transportation, custody, care, feeding and commitment of persons charged with or convicted of criminal offenses, shall be compensated for their services in connection with such persons only by salary.

Following this constitutional provision and the provision requiring classification of counties, the General Assembly has enacted a bill fixing the compensation of service in counties of the third class. This bill was passed with an emergency clause and approved April 19, 1946. It is House Bill No. 399. Section 1 of this bill is as follows:

"The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: In counties having a population of less than 7,500 the sum of \$1000; in counties having a population of 7,500 and less than 10,000 the sum of \$1200; in counties having a population of 10,000 and less than 11,500 the sum of \$1400; in counties having a population of 11,500 and less than 15,000 the sum of \$1600; in counties having a population of 15,000 and less than 24,000, the sum of

\$1900.00; in counties having a population of 24,000 and less than 30,000, the sum of \$2500.00; and in counties having a population of 30,000 and more, the sum of \$2800.00."

Census statistics for 1940 show the population of Lincoln County to be 14,395. From Section 1 of House Bill No. 899, supra, it is apparent the salary of the sheriff of Lincoln County is, therefore, \$1600.00 for his services in connection with the investigation, arrest, custody, feeding, transportation and commitment of persons charged with or convicted of crimes.

Section 4 of House Bill No. 899 has the following provision relating to the custody and feeding of persons in jail:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

This section is plain and unambiguous, and places the

duty of feeding the prisoners in jail squarely upon the sheriff, and not upon the county court. The duty of the court is to reimburse the sheriff for the actual expense incurred when the amount of the expense is properly certified by the sheriff to the county court.

For the performance of his duties, the sheriff, by Section 2 of this bill, House Bill No. 899, is allowed to appoint such deputies and assistants as are needed with the approval of the circuit judge. If, in feeding of prisoners, it should be necessary for the sheriff to employ an assistant to perform the service of cooking and serving the food, the sheriff would not be permitted to employ his wife. Section 6, Article VII, of the Constitution provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

A wife is related within the prohibited degree of relationship. See State ex inf. Norman v. Ellis, 28 S.W. (2d) 363.

Your letter states the county court would buy the groceries for the feeding of prisoners and the sheriff's family, and the sheriff's wife would do the cooking without charge. The county court has no authority to buy the supplies. Under House Bill No. 899, the furnishing of food to prisoners in jail is the duty of the sheriff, and the law does not authorize the furnishing of food to the family of the sheriff. For the county court to undertake to do this would be an attempt to increase the compensation of the sheriff by subterfuge.

Hon. Jonathan E. Clarke

-5-

CONCLUSION

The proposed plan for feeding prisoners in jail in Lincoln County and the family of the sheriff is without authority of law, and should not be entered into.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

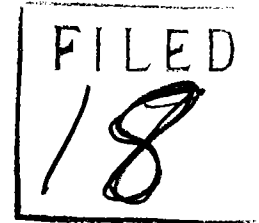
WOJ:LR

ELECTIONS: Declarations of candidacy may be filed with county clerk by mail or by a person other than the candidate himself. Receipt of payment to county central committee should be filed therewith.

April 19, 1946

FILED 18

Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"I am writing for an opinion as to what is a sufficient filing of a declaration of candidate under Section 11550 of Supplement to Missouri Laws of 1943.

"Our county clerk has received one declaration through the mails shown signed but with no declarations or instructions to him to file the declaration. Should he file this declaration since it is in proper form and duly signed, even though there are no instructions to him to file it except that he has received the declaration signed through the mails.

"Other declarations by candidates have been brought in to his office by others than the candidate whose name is signed on the declarations, and the party who brings these in says that the party who signed them wished the declaration filed.

"I would be glad to have an opinion as to whether these declarations are properly filed within the meaning of the law."

Section 11550, Laws of Missouri, 1944, Ex. Sess., p. 24, Sec. 1, referred to in your request, provides as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (..... precinct of the town of), or (theprecinct of the ward of the city of), or the precinct of township of the county of and State of Missouri, do announce myself a candidate for the office of on the ticket, to be voted for at the primary election to be held on the first Tuesday in August,, and I further declare that if nominated and elected to such office I will qualify.

....."

There is no provision in this section which would require one who is filing such declaration to supplement it by any extrinsic declaration of intention. The declaration provided for in Section 11550, supra, is in itself the expression of such intention without further explanation.

In connection therewith, however, Section 11551, R. S. Mo. 1939, provides:

"Each candidate, except for a township office, previous to filing declaration

papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, to-wit: To the treasurer of the state central committee--one hundred dollars, if he becomes a candidate for a state office, or judge of either of the courts of appeals; fifty dollars, if he be a candidate for representative in congress; twenty-five dollars, if he be a candidate for circuit judge or state senator. To the treasurer of the county central committee--five dollars, if he be a candidate for state representative or any county office; take a receipt therefor, and file such receipt with and at the time he files his declaration papers. The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, and shall be used as an expense fund by the several political parties upon whose tickets the various candidates propose as candidates and seek nomination; and such sums of money, so paid, shall be excepted from the terms and provisions of article 15 of this chapter." (Underscoring ours.)

The payment of this money is, as stated in this section, "evidence of their good faith in filing said declaration papers." In turn, the receipt for such payment is to be filed with the declaration papers, which gives the county clerk notice of such good faith.

The method by which such declaration shall be filed is not covered by statute. We find no provision which requires a candidate to file his declaration in person and are of the notion that such restriction is not the intent of Section 11550.

Many declarations have been filed by mail. Such was the situation in the case of State ex rel. Huse v. Haden, 163 S. W. (2d) 964. Although the precise question as to whether or

not such method of filing was proper did not directly confront the court, it was a fact in that case that a certificate of declaration had been so filed. The court did not question the propriety of this fact and accepted it as a matter of course. In the event it were improper, the court would, no doubt, have questioned it. It appears to us, therefore, that this is an accepted method of filing a declaration of candidacy.

As for the situation whereby a declaration is filed by a person other than the candidate himself, we quote from the case of Hewlett v. Carter, 239 S. W. 789, 1. c. 790, 194 Ky. 454, wherein it is stated:

"It is first insisted, under the grounds relied on in the original petition, that, if the certificate of nomination of the defendant Boggs was regular and possessed no inherent defect, it should have been filed by him in person and not by his attorney or agent, but we are cited to no case from any court so holding. There is nothing in our statutes remotely pointing to such a requirement, and we can discern no logical reason for it. On the contrary, we know, from observation and experience, that the practice of procuring a representative to file such certificates for and on behalf of the candidate has quite universally prevailed throughout this state, since the enactment of the Primary Election Law."

Such has been the practice in the State of Missouri, and in the absence of a provision to the contrary we are of the notion that this is not an improper practice.

It is the duty of the county clerk to file such declarations of candidacy as are presented to him. With regard to this duty we quote from the case of State ex rel. Fisler v. Glass, 192 P. 472, 1. c. 474, 44 Nev. 235, wherein it is stated:

"In the recent case of Security Savings & Loan Ass'n v. Brodigan, as Secretary of State, 192 Pac. 263 (not yet officially reported), we had occasion to say that it requires no elaboration of law or of the authorities to sustain the contention that ministerial officers have no jurisdiction to pass upon the validity of instruments presented to them for filing. Ministerial officers are by the law required to receive and file such instruments as are duly executed, provided such instruments purported upon their face to be of the nature of instruments entitled to be filed or recorded, as the case may be. Such officer has the right to exercise discretion as to matters of form, but not to exercise judicial discretion.

"In this instance the respondent Glass had no more right as a ministerial officer to decline to accept and file the certificate in question, because it failed to contain the places of residence of its signers, than he had the right to reject the certificate, because the signatures thereon were forged, or that the persons represented thereby were not qualified electors, or that their places of residence were false or fictitious. It would not do to say that a recorder of deeds could refuse to accept for filing a conveyance because it did not appear upon its face to be a legal instrument, or that the county clerk, as ex officio clerk of the court, could properly refuse to file a confessed judgment without legal requirements. So with a certificate of nomination. The county clerk under the statute has nothing whatsoever to do with its contents that admittedly go to the substance and validity of the certificate. The county clerk is not the guardian of the public's rights before or after election.

Honorable Joe W. Collins - 6

Neither is he concerned with the grievance of any elector who complains because a certificate upon its face does not contain, in the judgment of said elector, the requirements to be stated therein by law. We do not think that the Legislature intended to vest in a mere ministerial officer such important power as to pass upon the validity of a nomination certificate before accepting and filing it."

This same rule is found in the case of State v. Boyer, 271 P. 46, 127 Ore. 91.

Conclusion

It is, therefore, the opinion of this department that a declaration of candidacy as provided by Section 11550, Laws of Missouri, 1944, Ex Sess., p. 24, may be filed with the county clerk by mail or by a person other than the candidate himself when it is in the proper form and duly signed.

It is our further opinion that the receipt for payment to the county central committee of a political party upon whose ticket he purposes to run as a candidate, should be filed with his declaration papers to show good faith on his part in filing.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

CONSTITUTION:)
ROADS AND BRIDGES:)

Five questions regarding issuance of warrants in anticipation of revenue under Article X, Section 12(a), Constitution of 1945; setting up of the budget of counties in same respect; classification of expenditures under Sections 10911 and 10914, Laws of Mo., 1941; not necessary to revise budget after July 1, 1946.

May 23, 1946

FILED

18

4/3

Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an opinion which reads as follows:

"Section 12(a) of Article X of the new Constitution entitled ADDITIONAL TAX RATES FOR COUNTY ROADS AND BRIDGES-- Road Districts, among other things, provides that the County Court may levy an additional tax not exceeding 35% on the \$100 assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes.

"1. May the County Court draw warrants in anticipation of this revenue and

"2. Should the County Court set up in its Budget the amount anticipated from this source of revenue, and if so

"3. Should it be under class 3 of Section 10911 Laws 1941 page 650, and

"4. Be under class 3 of expenditures set up in Section 10914 Laws 1941, page 652.

"When the New Constitution takes effect will the County Court then have to revise its Budget."

Article X, Section 12(a) of the Constitution of Missouri, 1945, referred to in your request, is as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

This opinion deals only with the additional tax provided for in the first sentence of this section.

Pursuant to Article X, Section 12(a), supra, the Legislature has enacted House Bill 784, which was signed by the Governor on April 10, 1946, and will not become effective before July 1, 1946. Section 8527 therein provides:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government

and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

It is a general rule of law that a county may contract indebtedness in any year not to exceed the anticipated revenue for that year. The case of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S. W. 318, 1. c. 319, holds:

"* * * The counties of the state, in anticipation of their yearly revenue, issue warrants against such revenue.

The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This on the theory that the warrants represent valid contracts made during the year. * * *

In support of this contention the case of Thomas v. Buchanan County, 51 S. W. (2d) 95, 1. c. 99, holds:

"The other contention presented by respondents is that the act gives the county court 'an unrestrained license' to issue anticipation notes 'regardless of necessity.' In other words, the county court can issue notes and borrow money before there is any indebtedness to be paid with it. It is said this would make the county a borrower, put it on a credit basis, and take it away from the cash system, contrary to the intent and purpose of section 12, article 10, of the Constitution, as interpreted in earlier cases. We see nothing in this section forbidding the enactment of state laws authorizing counties to borrow money so long as the indebtedness does not exceed the constitutional limit. Cases which say sections 11 and 12 of article 10 of the Constitution put the counties of the state on a cash basis mean merely that the indebtedness contracted in any year shall not exceed the anticipated revenue for that year. State ex rel. Clark County v. Hackmann, 280 Mo. 686, 698, 218 S. W. 318, 320."

Section 2 of the Schedule of the Constitution of Missouri, 1945, provides that:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full

force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Bearing this last section in mind, Section 8527, R. S. Mo. 1939, is in effect until July 1, 1946. Under that section the special tax for road and bridge purposes could not exceed twenty-five cents per one hundred dollars valuation. House Bill 784 repealed Section 8527, R. S. Mo. 1939, and enacted in lieu thereof Section 8527 of that House Bill. Since House Bill 784 is ineffective until July 1, 1946, Section 8527, R. S. Mo. 1939, is at the present time controlling. However, House Bill 784 has potential existence since it may become operative July 1, 1946. The case of State ex rel. Otto v. Kansas City, 310 Mo. 542, 276 S. W. 389, 1. c. 395, holds:

"It is familiar law that a statute or a constitutional provision may have potential existence, though it will not go into operation until a future time. State ex rel. v. Dirckx, 211 Mo. 568, loc. cit. 578, 111 S. W. 1; Poindexter v. Pettis County, 295 Mo. 629, 246 S. W. 38, loc. cit. 40; State ex rel. Brunjes v. Bockelman (Mo. Sup.) 240 S. W. 209, loc. cit. 211. * * *"

The levy date for county taxes has been fixed by House Bill 468 which was signed by the Governor on April 6, 1946, with an emergency clause. Section 11044, of House Bill 468, provides:

"After the assessor's book of each county, except in the City of St. Louis, shall be corrected and adjusted according to law, but not later than September 1, of each year, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Since the levy is to be made on September 1st for the entire fiscal year and at that time Article X, Section 12(a), Constitution of Missouri, 1945, and also Section 8527, House Bill 784, should be in operation, the additional tax rates for county roads and bridges, provided by them, may be properly anticipated as revenue. Therefore, in answer to question one of your request, the county court may draw warrants in anticipation of revenue to be derived under these provisions.

Turning to question two, Section 8528 of House Bill 784, provides:

"The funds provided for in the preceding section shall be shown as a separate item on all of the financial, budget and other accounting statements of the county, and such fund shall be specifically and expressly shown and designated on all such as the 'Special Road and Bridge Fund' of such county."

Therefore, the county court should set up in its budget the amount anticipated from this source of revenue.

Class 3 under Section 10911, Laws of Missouri, 1941, page 650, is as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county."

We have hereinbefore discussed that Section 8527, R. S. Mo. 1939, is the section repealed by House Bill 784 and in lieu thereof a new section 8527 was enacted relating to the same subject matter. There are some changes in the new section but in general the same subject-matter is undertaken.

Several rules of statutory construction are set out by Judge Ellison in the case of State ex rel. Klein v. Hughes, 173 S. W. (2d) 877, concerning the repeal and reenactment of a statute, which are as follows (l. c. 880):

"* * * The general rule is that when part of a statute is repealed by an amendatory act, the provisions retained are regarded as a continuation of the former law, while those omitted are treated as repealed. Belfast Investment Co. v. Curry, 264 Mo. 483, 496, 175 S. W. 201, 204(2). Such amendments have been accepted as controlling evidence of the legislative intent. 59 C. J. Sec. 612, p. 1035. The presumption is that the Legislature intended the unamended part to remain operative and effective as before, State ex rel. Dean v. Daves, 321 Mo. 1126, 1151, 1152, 14 S. W. 2d 990, 1002(9-11). * *"

For our purposes, therefore, we may say that Section 10911, Laws of Missouri, 1941, is controlling in the present instance and that the proposed expenditures shall be derived from the revenue anticipated under Section 8527, House Bill 784, and will be budgeted under Class 3 of Section 10911.

Class 3 of Section 10914, Laws of Missouri, 1941, page 652, is as follows:

"Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed."

This is the most recent enactment concerning the classification of estimated expenditures of counties and is the only section under which such county expenditures may be budgeted. Therefore, question four of your request is also answered in the affirmative.

The budget should be set up so as to include the expenditures which are to be made during the current fiscal or calendar year, based on all of the revenue which may be properly anticipated. Section 8527, R. S. Mo. 1939, was anticipated in making up the county budget for 1946, and unless the court

Honorable Joe W. Collins - 8

should increase the levy of the special road and bridge tax under the provisions of House Bill 784 there would be no occasion to revise the budget. If, however, the court does increase the special road and bridge levy in accordance with House Bill 784, then it would become necessary to revise the budget.

Conclusion

It is the opinion of this department that: (1) the county court may draw warrants in anticipation of the revenue provided by Article X, Section 12(a), Constitution of Missouri, 1945, and Section 8527, House Bill 784, enacted pursuant thereto; (2) the county court should set up the amount anticipated from this source of revenue in its 1946 budget; (3) the revenue anticipated under Article X, Section 12(a), Constitution of Missouri, 1945, and Section 8527, House Bill 784, should be classified under Class 3 of Section 10911, Laws of Missouri, 1941 and (4) under Class 3 of Section 10914, Laws of Missouri, 1941; (5) the 1946 budget should include all of the revenue to be properly anticipated and unless the county court increases the special road and bridge levy in accordance with House Bill 784, it will be unnecessary to revise the budget after July 1, 1946.

Respectfully submitted

J. MARTIN ANDERSON
Assistant Attorney General

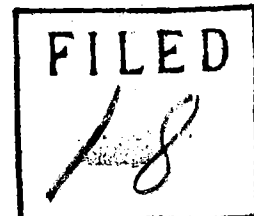
APPROVED:

J. M. TAYLOR
Attorney General

JMA:EG

ELEEMOSYNARY INSTITUTIONS: The Board of Managers of the Missouri School for the Blind may provide additional facilities to be paid out of a fund that does not contain an appropriation from the State of Missouri.

June 11, 1946



6-24
Mr. Martin J. Collins, President
Board of Managers
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis, Missouri

Dear Sir:

We hereby acknowledge your letter of recent date, requesting an opinion of this department, which reads as follows:

"For years, the Missouri School for the Blind at St. Louis has sought legislative appropriations to complete its building as it was planned in 1903. Through these years appropriations for this purpose have not been forthcoming.

"In the last few years, friends of the blind have been leaving money to the school to increase the facilities or otherwise improve the opportunities of these blind boys and girls in their pursuit of learning. The Board of Managers has conserved these funds in the hope that some day they might provide some of these additional facilities which the state has been unable to provide.

"A recent bequest, being settled in the May term of court, seems to provide the additional amount of funds to make possible the addition of a part of these needed facilities. The Board of Managers feels that under Chapter 72, Article 25, Section 10864, R.S. Mo. 1939, it has authority to use real or personal property donated to the school in the best interests of the school. The

Board has decided that the construction of part of the needed additional facilities for the school is most urgent.

"It has authorized a plan to request bids through the office of the State Purchasing Agent in the same manner as is required for funds appropriated from the State Treasury, except that the contract will be signed by the Board of Managers guaranteeing payment from these donated funds.

"1. The Board of Managers seeks to verify whether it has this authority under the section mentioned above."

Article 25, R. S. Mo. 1939, provides for the governing of the Missouri School for the Blind and the Missouri School for the Deaf. The following statutes of this article, which we quote in this opinion, will be considered only as they apply to the Missouri School for the Blind.

Section 10864 of said article, which provides for the control of the school property, reads as follows:

"The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

Section 10851 of said article provides:

"There shall be a treasurer of each school, appointed by the board of managers of the school, who shall give bond for the faithful performance of his duties in such sum, and with such sureties, as shall be required by the board. He shall have the custody of all moneys, obligations and securities belonging to the school, and shall make payment on such warrants and orders as prescribed by the board. He shall submit to the board each month a statement of moneys received and a list of the warrants, orders or checks paid by him the past month, giving the names of all persons to whom such payments were made. The treasurer shall reside in the city in which the school is located."

Under the above section the treasurer has custody of the moneys, obligations and securities of the school. The expenditure of this property by him is limited only by the orders of the board, and the board's powers are limited to the use of the property only for the benefit of the school. We are unable to find any other limitation except Section 10868 of this article, which will be considered later in this opinion. We believe this portrays an intention of the General Assembly to grant broad discretionary powers to the board in the management of the property of the school. Of course, if the disposition of real estate is involved in your proposition it will be necessary for the General Assembly to pass an act authorizing the sale or disposal of the same.

Section 10850 of said Article 25 provides:

"The board of each school shall make detailed reports biennially to the general assembly of their proceedings, the condition of the school, the number of pupils, and other facts connected with the school, including the exact receipts and expenditures of the board, accompanied by the biennial reports of the superintendent, treasurer, and such other reports as the board may deem necessary."

Since a report of the "exact receipts and expenditures" is required, we believe that the General Assembly contemplated that the board would be recipients of other property than that appropriated from the State Treasury. As a matter of fact, the board has, throughout the years, received property gifts from many individuals. In that it has been necessary to show these on the reports to the General Assembly, and, since no law has been passed as to the disposal of same, we believe that the General Assembly contemplated that the Board of Managers would have complete control over this property, subject only to the provisions of Article 25, R. S. Mo. 1939. If this were not true, then they could have passed further laws dealing with the expenditure of this fund.

Although the exact question presented for opinion has not been passed on by the courts of this state, we believe the case of State ex rel. Thompson, State Treasurer, v. Board of Regents for Northeast Missouri State Teachers' College, 305 Mo. 57, 264 S.W. 698, presents an analogous situation. The Board of Regents of the Northeast Missouri State Teachers' College were recipients of a large sum of money from an insurance policy which they had placed on the school buildings. They wished to use this money to replace a building destroyed by fire, but the state contended that the money should be paid into the State Treasury. The court held that the money was not to be paid in to the State Treasurer and that the Board of Regents had broad discretionary powers in the manner in which the said money should be spent. Like the Board of Managers for the Missouri School for the Blind, the Board of Regents were given, by statute, broad powers of management of the school property.

It might further be argued that this money should be paid into the State Treasury under Article IV, Section 15 of the Constitution of Missouri of 1945, which provides in part:

"* * * All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. * * * * *

This question was also answered by the Supreme Court in the case of State ex rel. Thompson, State Treasurer, v. Board of Regents for Northeast Missouri State Teachers' College, supra.

Article IV, Section 43, Constitution of Missouri of 1875, provides in part:

"All revenue collected and moneys
received by the State from any source
whatsoever shall go into the treasury,
*****"

It can readily be seen that the provisions of the two Constitutions quoted above are very similar. Therefore, the interpretation by the court of the section of the Constitution of 1875 is a very significant guide to the answer to our question. In holding that the money received would not come under the above constitutional provision of 1875, the court states, l. c. 65:

"* * * Unless, therefore, it can be successfully contended in harmony with well recognized rules of interpretation that the Board of Regents of the College is the State and that moneys received by it other than from appropriations is state money; the constitutional provision will afford no support to the relator's contention.

"While the board, in a sense, represents the State in the performance of its duties, it is but one of the many necessary instrumentalities through which the former is enabled to act within the scope of the powers conferred by law. These powers embody no attributes of sovereignty which would entitle them to be designated as the State's alter ego. While in a sense, the board is an agent of the State with defined powers, the importance of its duties, with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first, because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the future; and, second, because a restriction of the board's powers to the letter of the law would destroy its efficiency and to

that extent cripple the purpose for which the institution was created. Legislatures, therefore, moved by that wisdom which is born of experience whether conscious or not of that aphorism that 'new occasions teach new duties; time makes ancient acts uncouth,' have contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined and which may, under changed conditions, arise in the future, to the discretion of the board."

From the above language of the Supreme Court it seems very clear to us that the fund in question of the Missouri School for the Blind would not be required to be paid into the State Treasury and, therefore, would not be state money.

You state in your letter that you have "authorized a plan to request bids through the office of the State Purchasing Agent in the same manner as is required for funds appropriated from the State Treasury." We believe this is necessary, and sufficient, to comply with the other sections of Article 25, R. S. Mo. 1939, and especially with Section 10868 of said article, which reads as follows:

"All purchases for either school shall be at the lowest price, and to this end the board of managers of such school shall require, as far as practicable, all purchases to be made from the lowest bidder, and shall invite competition by requiring its purchasing agent to notify leading dealers in the articles to be purchased of the quantity wanted and when to be delivered, such notices to be sent to all leading dealers in the town where the school is located, and also to dealers in such articles as are wanted in any city in the state where such articles are purchased for the ordinary trade of the town where the school is located. The board shall furnish to its purchasing agent or officer who has charge of this business suitable blanks, designating the articles wanted and the time they are to be delivered. All bids for such articles shall be made for

the articles delivered at the school free of any charge for freight or expressage. Whenever any dealer in such article or articles as may be wanted by either school shall request the board, or any officer of the school, to furnish such dealer with such notice, such purchasing agent shall mail to such dealer such notice, and his bid shall be considered with others before purchase is made. At each monthly meeting the officer or agent whose duty it is to make such purchases shall lay before the board all bids received by him, and contracts made for such supplies as he may have purchased, and the accounts for the same shall be allowed and warrants ordered therefor at the next meeting of the board: Provided, such articles shall have been delivered and received by such agent or officer according to the contract therefor: Provided, that nothing in this article shall prohibit any board from making contracts for a longer time than one month."

It is noted that Senate Committee Substitute for Senate Bill No. 297, truly agreed to and finally passed, with an emergency clause, by the 63rd General Assembly, and approved by the Governor, April 26, 1946, provides for a director of public buildings.

Section 118, subsection (d), of the above bill, providing for the director's duties and responsibilities, reads in part as follows:

"(d) The Director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the Director, and no claim for repair, con-

struction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the Director: Provided, that there is excepted herefrom the design, architectural services, construction, repair, alteration or rehabilitation, of all laboratories, libraries, class-rooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit built wholly or in part from funds other than State appropriations."

(Emphasis ours.)

From the above statements in your letter for opinion, the money to be used for the improvements has been left to the school by different individuals, and, it is from this fund, and this fund only, that you will pay for said improvements. This being the case, the proviso of the above section will apply and the procedure will be governed by Article 25, R. S. Mo. 1939.

Conclusion

Therefore, it is the opinion of this department that the Board of Managers of the Missouri School for the Blind may provide additional facilities, to be paid out of a fund that has been created by gifts from certain individuals in the last few years.

Respectfully submitted,

APPROVED:

PERSHING WILSON
Assistant Attorney General

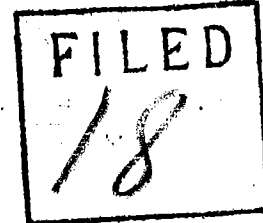
J. E. TAYLOR
Attorney General

PW:CP

ELECTIONS: CONSTITUTIONAL LAW:
OFFICERS: ASSESSOR:

RE: The assessor of St. Francois County who was appointed to fill the vacancy in the office does not hold office for the entire term but only until the beginning of the term after the next general election.

July 13, 1946



Mr. W. E. Coffey
Prosecuting Attorney
Farmington, Missouri

Dear Mr. Coffey:

We acknowledge receipt of your letter of recent date requesting an opinion of this department as follows:

"J. A. Wampler was elected to the office of Assessor of St. Francois County, Missouri, at the General Election 1944, succeeding himself in office, and entered upon his new duties January 1, 1945. He died in August, 1945, and C. A. Doubet was appointed by the Governor to fill the vacancy on August 24, 1945.

"The new Constitution (including Schedules 2 and 3) became effective March 27, 1945.

"The Governor approved House Bill No. 469 on December 5, 1945.

"My point of inquiry is whether or not an election to the office of Assessor in St. Francois County, under existing law, will be necessary at the General Election of 1946, or as otherwise stated, does the term of Mr. C. A. Doubet end in 1946 or will it end in September, 1949, and whether the Clerk of the County Court should place his name upon the ballot for re-election at the General Election of 1946."

Section 11509, R. S. Mo. 1939, reads as follows:

"Section 11509. Vacancies, how filled

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally

filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

The legal question involved is whether the provision of the Constitution of Missouri and House Bill No. 469, passed by the 63rd General Assembly and approved by the Governor, invalidates the provisions of the above quoted section.

Section 11509, supra, was held constitutional in State ex rel. Wayland v. Herring, 106 S. W. 984, 208 Mo. 708. The court in that case specifically considered Section 11, Article V of the Constitution of 1875 dealing with the terms of appointees appointed by the Governor to fill vacancies in public offices where the filling of vacancies was not otherwise provided for by law. This constitutional provision read as follows:

"Sec. 11. Vacancies in office--Governor may fill

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

The provision of Section 4, Article IV of the Constitution of 1945 relating to this subject is substantially the same as the provision of Section 11, Article V of the Constitution of 1875. Section 4, Article IV reads as follows:

"Power of Appointment to Fill Vacancies--
Tenure of Appointees.--The governor shall
fill all vacancies in public offices unless
otherwise provided by law, and his appointees
shall serve until their successors are duly
elected or appointed and qualified."

The Constitution of 1875 carried a section, Section 5, Article XIV, which, in substance, is the same as section 12 of Article VII of the Constitution of 1945, and reads as follows:

"Sec. 5. Tenure of office

"In the absence of any contrary provision, all officers now or hereafter elected or appointed subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Thus, with relation to the question before us, the provisions of the Constitution of 1945 are the same in substance as the provisions of the Constitution of 1875, which was in force at the time the case of State ex rel. Wayland v. Herring, supra, was decided. Since the court, in the Herring case, held Section 11509, supra, constitutional, it follows that Section 11509, supra, is not in conflict with the Constitution of 1945 and is therefore still constitutional.

Section 2 of the Schedule of the Constitution of 1945 provides, in part, as follows:

"Sec. 2. Effect on Existing Laws.-- All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly.* * *"

Since Section 11509, supra, is consistent with the provisions of the new Constitution, it remains in force, under Section 2 of the schedule, until amended or repealed by the General Assembly. It has not, to date, been amended or repealed and is, therefore, still in full force and effect and must be controlling in the matter presented for our determination. Section 2, page 1 of House Bill No. 469 reads as follows:

"Section 2. At the general election in the year 1948 and every four years thereafter the qualified voters in each county in this state, except those under township organizations, shall elect a county assessor. Such county assessors shall enter upon the discharge of their duties on the first day of September next after their election and shall hold office for a term of four years, and until their successors are elected and qualified, unless sooner removed from office: Provided, that this section shall not apply to the City of St. Louis."

This section does not affect the application of Section 11509, supra, to the question. In State ex rel. Bothwell v. Green (1944) 180 S. W. (2d) 12, 352 Mo. 801, the Supreme Court of Missouri had before it a question which was the same in principle as that here presented. In that case the county collector of Pettis County was reelected for a term to begin on March 1, 1943. He died on December 25, 1942, and the Governor then appointed one, Hazel Palmer, to fill the vacancy created by his death. The court held that Hazel Palmer did not hold the office for the full regular term of four years from March 1, 1943, but only until March 1st, after the next succeeding general election. The court quoted Section 11055, R. S. Mo. 1939, which provided that the collectors should "hold their office for four years and until their successors are duly elected and qualified". It will be observed that this is the same provision as is found in Section 2 of House Bill No. 469, except for the word "duly". The court also quoted Section 11509, supra, as being the general statute on filling vacancies, and said at l. c. 806:

"We must read in conjunction with the statute on collectors the general statute on filling vacancies. * * *"

The court further said at l.c. 806 and 807:

"* * *Clearly in this case the office became vacant upon the incumbent's death and Section 11509 furnished the authority to fill the vacancy and the conditions on which it was to be filled.

"Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer; the vacancy was filled by the appointment of Hazel Palmer; her term under the appointment expires at the day designated for the beginning of the term, that is March 1, after the first ensuing general election, namely the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944."

There being no question, therefore, that Section 11509, supra, is still in full force and effect, we must apply the provision of that section to the present situation just as did the court in State ex rel. Bothwell v. Green, supra. The result of this is that

Mr. W. E. Coffey

-5-

the term of Mr. C. A. Doubet ends January 5, 1947. We understand that Mr. Doubet's name has been placed on the primary ballot and he is therefore eligible to have his name placed upon the ballot at the next general election in November, 1946.

CONCLUSION

It is, therefore, the opinion of this department that the term of Mr. C. A. Doubet ends on the fifth day of January, 1947, and if he desires to hold the office after that date his name should be placed upon the ballot at the general election in November, 1946, so that his candidacy may be voted on by the people.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

TAXATION AND REVENUE:

Five questions relative to procedure to be had under H.C.S.R.B. 868 of the 63rd General Assembly, relating to taxation of intangible personal property.

FILED

18

August 25, 1946

9-12

Honorable Frank Collier
Prosecuting Attorney
Wright County
Mountain Grove, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"As prosecuting attorney of Wright County, I request an opinion relative to the personal intangible property assessment, liability for taxes, and manner of collection in case of failure to make return.

"John Doe makes a loan of real estate and takes a deed of trust to secure the loan, which is recorded in the proper county. Thereafter he sells the loan to Richard Roe, and no longer is interested in the loan, except that he collects the interest, or payments, from the maker and forwards them to Richard Roe.

"The questions in which I am interested are as follows:

"Who is required to make return to the assessor? In event the actual owner of the note, Richard Roe, fails to make return, what is the liability of John Doe? In event of a check of the records, and it be ascertained that John Doe had sold the loan to Richard Roe, and was not the actual owner and receiving the income therefrom at the date the assessment was due, would he not be

entitled to make showing of the fact and thereby escape liability or penalties? Would the fact that he was collecting the income from the note require him to make return to the assessor? Suppose neither the original owner, or the actual owner of the note make return, what procedure would be followed, and what penalties would attach, and to whom?"

Pursuant to the constitutional mandate found in Article X of the Constitution of Missouri of 1945, the 63rd General Assembly has adopted a completely new scheme for the taxation of intangible personal property in Missouri. The procedure is found in H.C.S.H.B. 868 of the current Legislature, and we must look to that statutory enactment to find the answers to your inquiries.

You have not indicated in your letter of inquiry whether you are referring to the taxes due for the calendar year 1946 or for subsequent years, and in view of the fact that different rules are applicable, we necessarily have answered your questions in the alternative. In each instance the answer with respect to the current tax appears first under the separate paragraphing which we have assigned to your five questions. We have also considered your questions on the basis that all parties owning the intangible personal property were residents of the State of Missouri and have disregarded any questions which might arise by reason of nonresidence. We understand from your letter that the transaction referred to therein is the ordinary lending of money, taking as evidence of the debt a promissory note secured by a lien in the form of a deed of trust upon real property. That such intangible personal property is subject to the provisions of the new tax law appears in the following provision of the Act: "Section 1. (B) Intangible personal property means * * * notes * * *." In the opinion your questions have been considered in separate paragraphs in the order they appear in your letter of inquiry.

I.

Your first question relates to determination of the proper person to make the return to the Director of Revenue as provided by the Act mentioned.

For the calendar year 1946, the liability for such return is governed by the following provisions appearing in Section 2 of the Act:

"Section 2. * * * The person who on July 1, 1946, owned the legal title to or equitable title or beneficial interest in intangible personal property subject to this property tax thereon, shall be liable for said tax."

Section 3 of the Act provides as follows:

"Section 3. The returns for the year 1946 shall be filed with the director of revenue on forms supplied by the director of revenue, on or before September 1, 1946, and the tax shall become payable at the time the return is made and become delinquent on November 1, 1946; provided, however, that any person whose total tax, under the provisions of Section 2 of this Act, amounts to one dollar (\$1.00) or less shall not be required to file a return."

For the calendar year 1947 and succeeding years, the liability for filing the return is governed by the provisions of Section 5 of the Act:

"Section 5. The tax for the year 1947 and each succeeding year shall be apportioned among those persons who during the preceding calendar year held or acquired the legal title to or equitable title or beneficial interest in intangible personal property subject to the property tax provided by Section 4 of this Act, according to the part of the entire yield of such property which they respectively received during the preceding calendar year, and each such person shall be liable for his resultant portion of said tax."

Section 7 of the Act further provides:

"Section 7. Except for the calendar year 1946, every person who, pursuant to any provision of this Act, is liable for a property tax on intangible personal property, shall on or before March 15 of the year for which the property is subject to said tax, file with the Department of Revenue on a suitable form prepared and distributed by it, a property tax return on intangibles, showing the kind of intangible owned, the amount of yield therefrom and the

amount of tax for which he is liable for the year involved. The tax shall be payable at the time the return is made and shall become delinquent on June 1st of the year in which it is due."

II.

Your second question relates to the liability of the original owner of the intangible personal property who has transferred his interest therein to a transferee who fails to make return thereof for purposes of taxation.

For the calendar year 1946, the liability for making the return is predicated upon ownership July 1, 1946, as set out in Section 2 of the Act, quoted supra. Consequently, if the transfer was made prior to that date, there would be no liability to make return on the original owner of the intangible personal property.

It is a fundamental law of taxation that property may only be assessed to the owner thereof. We quote from State ex rel. v. Railway Co., 82 Mo. 683:

"This court held in Abbott v. Lindenbower, 42 Mo. 167, that 'An assessment in the name of a person who neither was, * * * the owner of the property, would be an utterly void assessment.'"

For the calendar year 1947 and subsequent years, each person owning the intangible personal property for any part of the year is required to file a return as provided by Section 5 of the Act, quoted supra. Here, again, the rule quoted from State ex rel. v. Railway Co., cited supra, would be applicable, and no liability could be placed upon the transferrer for taxes due and owing by his transferee.

III.

Your third question relates to the determination of factual matters relative to the transfer of intangible personal property during the year.

As mentioned in the case of State ex rel. v. Railway Co., cited supra, any assessment would be void if not based upon ownership. We think that the taxpayer would certainly have the

Honorable Frank Collier - 5

right to make necessary proof of nonownership in the event that an assessment was made against him.

IV,

Your fourth question relates to the liability of a person to make return where he serves merely as a conduit for the transmittal of collections made in the form of yield on intangible personal property.

We have quoted from Sections 2 and 5 of the Act, dealing with the calendar years 1946 and 1947, and subsequent years, both of which clearly show that only the person holding the legal title to or equitable title or beneficial interest in intangible personal property is required to make return. Applying these rules to the situation presented by your question, it is readily apparent that if in fact the original owner is merely serving as a collecting agent for the owner of the legal title to the intangible personal property, such collecting agent is under no liability to file a return.

V.

Your fifth question relates to the procedure to be followed in the event of a failure to return the intangible personal property for taxation.

The procedure in this regard is covered by the following provisions of the Act:

"Section 8. In case any taxpayer shall fail to make a return as provided by this act or shall make an insufficient return, the Director of Revenue shall, at any time within three years after the return of such taxpayer is required by law to be filed, make the assessment or additional assessment of such intangible property and shall notify the taxpayer of such action and the reason therefor. Such taxpayer shall, upon written application be given a hearing by the Director of Revenue on such assessment or additional assessment and shall have the right to appeal to the State Tax Commission as provided by law."

"Section 11. Every person who is liable for any tax pursuant to the provisions of this Act and who fails to pay the same when it is due shall be required to pay as part of such tax interest thereon at the rate of one per cent (1%) per month from such time but not to exceed ten per cent (10%) per annum, and the method of collecting the tax and penalty shall be the same as provided by law in the case of delinquent income taxes."

"Section 13. Every person who fails or refuses to make the return required by this Act; or who makes any false or fraudulent return or false statement in any return, with intent to evade the payment of the tax or any part thereof, imposed by this Act; or who aids or abets another in any attempt to evade the payment of the tax, or any part thereof, imposed by this Act; and every officer or employee of any company or association who shall make or participate in the making of any false return, or any false statement in any return required by this Act, with the intent to evade the payment of any tax hereunder, shall, upon conviction, be deemed guilty of a misdemeanor."

CONCLUSION

In the premises, we are of the opinion:

(1) That the person required to make return of intangible personal property for the calendar year 1946 is the person who on July 1, 1946, owned the legal title to or equitable title or beneficial interest therein, and that for the calendar year 1947 and subsequent years such person is anyone who, during any part of the calendar year, owned the legal title to or equitable title or beneficial interest in such intangible personal property;

(2) That the failure of a transferee to make return of intangible personal property for taxation purposes will not have the effect of imposing liability therefor upon his transferor for the period that such transferee owned the legal title to or equitable title or beneficial interest in such intangible personal property;

(3) That no valid assessment may be made against the transferrer of intangible personal property unless such transferrer owned the legal title to or equitable title or beneficial interest in such intangible personal property for some period of the calendar year such as to subject such transferrer to liability for the tax or a portion thereof;

(4) That merely acting as a collecting agent for the actual owner of intangible personal property and receiving yield therefrom, which is transmitted to such actual owner, would not subject such collecting agent to liability for making return;

(5) That failure to file return of intangible personal property would authorize the Director of Revenue to make an assessment thereof as provided by Section 8 of H.C.S.U.B. 868, and would subject the taxpayer to the civil penalties provided by Section 11 of said Act, being interest on such tax at the rate of one per cent per month from the due date thereof, but not exceeding ten per cent per annum, until paid, and to the criminal penalties provided in Section 13, making the evasion of the provisions of the Act a misdemeanor.

Respectfully submitted,

WILL M. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

ASSESSORS
CONSTITUTIONAL LAW:

) House Bills 891 and 890, which raise the
) fees of assessors of third and fourth class
) counties, are not in violation of Sec. 13,
) Art. VII, Const. of Mo. 1945, which prohibits
) the increasing of compensation of county
) officers during their terms.

December 10, 1946

FILED

12-19
18

Mr. Obye Cocker, President
Missouri Assessors Association
Caruthersville, Missouri

Dear Sir:

This is in answer to your request for an opinion of this department as to whether assessors of counties of the third and fourth class shall receive as their compensation fees in accordance with House Bills 891 and 890, respectively, or whether their compensation during their present term shall be fees collected in accordance with Section 10996, R. S. Mo. 1939.

Section 10996, R. S. Mo. 1939, provides in part as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: * * *

Section 1 of House Bill 891 of the 63rd General Assembly, provides:

"The compensation of the county assessor in counties of the third class shall be

45 cents per list, and each county assessor shall be allowed a fee of 6 cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the third class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

Section 1 of House Bill 890 of the 63rd General Assembly, provides:

"The compensation of the county assessor in counties of the fourth class having a population of 7500 or more shall be 45 cents per list, and in counties having a population of less than 7500 shall be 45 cents for each personal assessment list and resident land list and 20 cents for each non-resident real estate assessment list; and in all the counties of the fourth class, each county assessor shall be allowed a fee of 6 cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list. "

In comparing the fees received under the Revised Statutes of 1939, and those provided for by the 63rd General Assembly, it can readily be seen that there has been an increase in the amount of these fees. This raises the question of the constitutionality of these two House Bills, as applied to the present term of the assessors, because Section 13, Article VII of the Constitution of 1945, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This section was taken from Section 8, Article XIV of the Constitution of 1875, which provides:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

These sections are substantially, for our purpose, the same, except the word "fees" has been left out of the Constitution of 1945. This elimination will be taken up later in this opinion.

In the case of *State ex rel. Emmons v. Farmer*, 271 Mo. 306, 196 S. W. 1106, the Supreme Court of Missouri had before it the question of whether or not a law fixing the circuit clerk's salary at \$2,000.00 per annum was unconstitutional under the Constitution of 1875. Before this salary bill was enacted the circuit clerk was compensated for his duties by fees but he was allowed to retain only a maximum of \$2,000.00 of the fees collected. It was admitted that during the last four years he collected less than \$2,000.00. Regardless of this fact, the court held that his compensation was not increased within the provision of Section 8, Article XIV of the Constitution of 1875. Although we realize the question presented to us is different in that the fees are actually increased instead of changing from a fee basis of compensation to a salary basis, we believe the ruling in this case would apply to the question before us. In the *Emmons* case the court stated, 271 Mo., 1. c. 317:

"We are constrained therefore to hold that the Act of 1913 (Laws 1913, p. 702) fixed

the basic compensation for clerks of the circuit courts and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations, constitute the salaries from which we are to determine whether the Act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question and conclude that as to the relator there has been no increase and the act is constitutional. * * *

The court in referring to the Act of 1913 is referring to the Act that set a maximum of \$2,000.00 that the circuit clerk could retain from fees collected. This, they stated was the basic compensation of the circuit clerk and thus is what they construed to be the compensation of the circuit clerk within the meaning of the word "compensation" in Section 8, Article XIV of the Constitution of 1875.

Under the ruling of the Emmons case the assessors of the third and fourth class counties also have their basic compensation established by Section 13450, R. S. Mo. 1939, which provides in part as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. * * *

Therefore, since the basic compensation of the assessors of third and fourth class counties was not changed by House Bills 890 and 891, there would be no increase of compensation and these two acts would be constitutional.

Although Section 13, Article VII of the Constitution of 1945 does not now contain the word "fees," we are of the opinion that fees are contained within the definition of the word "compensation." In the case of State ex rel. Emmons v. Farmer, supra, the court stated at l. c. 311, 312:

"Moreover, the language of the Constitution includes both fees and salary under the comprehensive term compensation as witness this language: 'The compensation or fees of no state, county or municipal

officer shall be increased during his term of office.' (Sec. 8, art. 14, Constitution.) Clearly fees are not salary; so if the provision of the section quoted supra includes salary at all--and no one would be so bold as to deny that it does--then the word compensation is the generic term and includes as used in the above provision of the Constitution, salary, fees, pay, remuneration for official services performed, in whatever form or manner, or at whatsoever periods the same may be paid. * * * * *

* * * It is clear that the makers of our Constitution used the word compensation as the comprehensive generic term, and thereafter added the word 'fees' as an inclusive and explanatory second-thought, although remuneration by fees was already included by the use of the term compensation, as witness the punctuation, which lacks the comma after the word compensation."

Here the court merely treats the word "fees" as surplusage, which would have no bearing on our question.

Conclusion

Therefore, it is the opinion of this department that after July 1, 1946, assessors of the third and fourth class counties are entitled to charge fees in accordance with House Bills 891 and 890, respectively, and may retain a maximum of \$5,000.00 per annum in accordance with Section 13450, R. S. Mo. 1939.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAX LEVY: An increase in the levy above the constitutional and statutory limit of taxes for public health purposes would be unconstitutional, when such levy is ordered by the circuit court.

November 14, 1946

FILED

19

11/25

Mr. J. V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri

Dear Sir:

This acknowledges receipt of your request for an opinion based on the following facts:

"Our County Court has made a levy of 50% on the \$100.00 assessed valuation for general revenue purposes in this county, and we understand that to be the limit allowed under the new constitution, the same as it was under the old constitution.

"Now the County Court seems to desire that an additional levy be made for public health purposes; specifically to aid the DDT spraying program for the year 1947. This project has proven very beneficial to this part of the state.

"We notice that the new constitution provided for such a levy in addition to the limitation of 50% on the \$100.00 assessed valuation, provided the legislature passes a law for such purposes, and we observe that the legislature has now enacted sections 11040 and 11041 of the Laws for the year 1945, which would seem to relate to this subject matter.

"However we note that in section 11040 mention is made that the tax levies mentioned therein shall include those for public health and etc. The point that has us worried is whether or not this would make it

necessary to include such a levy with the others made for general revenue purposes and limit the total to 50% on the \$100.00 assessed valuation. In other words, the thing we desire to know is whether under the existing state of the law, our County Court can levy a tax in excess of the 50% on the \$100.00 assessed valuation for public health purposes by following the procedure outlined in section 11041 of the 1945 statutes."

Section 11(b) of Article X of the 1945 Constitution provides:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For counties - thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties; * * * * "

New Madrid County has an assessed valuation of less than three hundred million dollars, hence the fifty cent maximum would be applicable.

The New Madrid County Court, having made the maximum levy allowed by the Constitution of 1945, would be precluded from making an additional levy unless authority for such is contained in the Constitution.

Section 11(c) of Article X of the 1945 Constitution provides for an additional levy for certain purposes by specific methods and under certain circumstances, and is as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase

are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

(Emphasis ours.)

Other than by a two-third vote of the people, the underlined portion of this section of the Constitution authorizes an increase in levy only when authorized by law and then only for library, hospital, public health, recreation grounds and museum purposes.

The question then arises as to whether the Legislature, pursuant to this constitutional provision, authorized any such increase in the levy. Dealing with the taxes to be assessed, levied and collected, the General Assembly enacted Section 11040, Mo. R.S.A. 1939, House Committee Substitute for House Bill No. 468, Section 1, which is as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and taxes necessary to pay the funded or bonded debt of the state, county, township, municipality, road district, or school district, the taxes for current expenditures for counties, townships, municipalities, road district and school district, including taxes which may be levied for library, hospitals, public health, recreation grounds and museum purposes, as authorized by law."

This section expressly provides that the levy made includes expenses for public health, etc., and precludes, rather

than authorizes, an additional levy for such items, and unless other statutes could be found directly authorizing an increase above the maximum set by the Constitution and by this statute for such purposes as public health, an additional levy would be unconstitutional.

Then follows Section 11041, Mo. R.S.A., House Committee Substitute for House Bill No. 468, Section 1, which is the only statute we are able to find providing for an additional levy above the constitutional and statutory limitations. Said section is as follows:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county counselor of any county, upon the request of the county court of such county - which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section - shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled

by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

(Emphasis ours.)

The underlined parts of this section clearly show that an additional levy, as authorized therein, must be for taxes and purposes other than those specified in Section 11040, Mo. R.S.A., which is the preceding section and in which public health is specified and included.

Conclusion.

It is therefore the opinion of this department that an additional levy of tax ordered by the circuit court, above the fifty cent maximum set by the Constitution and statute, for the purpose of public health would be unconstitutional.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

SCHOOL:) (1) University of Missouri may charge Veterans.
SERVICEMEN:) Administration non-resident tuition fees for resident
veterans; (2) Lincoln University may charge Veterans
Administration non-resident tuition fees for resident
veterans; (3) State Teachers Colleges may charge
Veterans Administration non-resident tuition fees for
resident veterans.

January 23, 1946

FILED

20

1/29

Honorable Ray J. Cunningham
Chief Attorney
Veterans Administration
707 Market Street
St. Louis 1, Missouri

Dear Sir:

We are hereby withdrawing an official opinion issued to you by this department on July 9, 1945, holding: (1) that the University of Missouri may not charge Veterans' Administration tuition for veterans over the age of 16 years who are residents of the State of Missouri; (2) that state teachers colleges may not charge Veterans' Administration tuition fees for veterans that are residents of the State of Missouri, unless they charge tuition to all residents of the State of Missouri.

The opinion mentioned above was based upon the provisions of Public Law 346, 78th Congress (Servicemen's Readjustment Act of 1944), Section 1505, which authorized the deduction of any benefits received by, or paid for, any veteran under the Servicemen's Readjustment Act of 1944, the same being charged against and deducted from any later adjusted compensation that might have been provided for the veteran in the future, making the payment of tuition by the Veterans Administration in reality a contingent liability that would have been deducted from any future adjusted compensation that possibly in the future might personally affect the veteran in his own rights.

Since rendition of the opinion on July 9, 1945, Section 1505, supra, has been repealed by Section 9 of Public Law 268, 79th Congress, finally passed and approved December 28, 1945.

Since the repeal of Section 1505, supra (Servicemen's Readjustment Act of 1944), the reason that the University of

Missouri was not permitted to charge and receive from the Veterans Administration tuition fees for veterans properly enrolled as students under the provisions of Public Law 346, 78th Congress, and that the state colleges were not permitted to charge and receive from the Veterans Administration tuition fees for veterans properly enrolled as students under the provisions of Public Law 346, 78th Congress (Servicemen's Readjustment Act of 1944), no longer exists.

The Administrator of Veteran affairs, General Hines, requested a number of persons connected with educational institutions to serve as an advisory committee to the Veterans Administration in determining operating policies under the GI Bill. The members of that advisory committee included the civilian members of the joint Army-Navy Board of contract negotiations, which established the policies for the war training courses contracts of the Army and Navy. That advisory committee recognized the inequity of allowing state-supported universities the regular resident tuition only, and since the Army and Navy had made contracts with the state universities on the basis of the payment of non-resident tuition in addition to regular fees, it was felt that this would be a fair arrangement for the payment of fees and tuition under the provisions of the GI Bill.

Under date of March 7, 1945, the Veterans Administration accordingly issued a letter of instructions for the guidance of all concerned on the subject of whether under Public Law No. 16 and No. 346, 78th Congress, there is authority to pay a charge for instruction of trainees in excess of that paid for other students for identical courses of instruction. Paragraph A, Item (2) of that letter reads as follows:

"In the case of State and municipal schools, colleges, or universities, and other approved institutions which have non-resident tuition fees, the charges for such tuition, laboratory, library, health, infirmary and other similar fees which were in effect prior to June 22, 1944, or as may be established after said date if applicable to all classes of students are determined as the customary charges for all veteran trainees except that the charge for the tuition fee of a full-time veteran trainee shall be not less than \$15.00

per month (\$45.00 per quarter or \$60.00 per semester), provided that the charges are not in conflict with existing laws or other legal requirements. Under this provision a school may not charge to a resident veteran such part of a non-resident tuition fee as will result in a charge in excess of \$500 for an ordinary school year."

The above paragraph, read in its entirety, definitely contemplates the payment of non-resident tuition fees as the customary charges for all veteran trainees as a general proposition. We understand that some stress is laid on the words "provided that the charges are not in conflict with existing laws or other legal requirements" by the Veterans Administration as raising some doubt on the question of whether or not non-resident tuition can be paid for resident veteran trainees. It would seem that such words could not have been intended to nullify the effect of the language in the first part of the paragraph determining the non-resident fees to be the customary charges for all veteran trainees, subject to the \$500 maximum limitation.

If we are to give meaning to the entire paragraph in question and to carry out the apparent intention of those who participated in formulating the program, the applicability of the words "provided that the charges are not in conflict with existing laws or other legal requirements," must be restricted to those cases, and those cases only, where "existing statutes or other legal requirements" definitely forbid the university from accepting any sum in excess of the resident tuition and fees for resident students.

The Constitution of the State of Missouri, 1945, Article IX, Section 9, provides as follows:

"The government of the State University shall be vested in a Board of Curators consisting of nine members appointed by the Governor, by and with the advice and consent of the Senate. * * * "

Section 10814, Missouri Statutes Annotated, grants the Board of Curators the right to collect reasonable tuition in the

professional departments, and necessary fees for maintaining the laboratories in all departments of the university, and to establish all reasonable fees for library, hospital, incidental expenses or late registration, as they may deem necessary.

Pursuant thereto the University through its Board of Curators has been accepting resident veteran trainees upon a non-resident tuition basis as contemplated by the provisions of the Veterans Administration service letter mentioned supra, and we do not find that the acceptance of these students upon such basis is in any way "in conflict with Missouri laws or other legal requirements" so as to preclude the University of Missouri from receiving tuition for such trainees from the Veterans Administration.

As to Lincoln University, its control and management is under a Board of Curators appointed by the Governor, with the advice and consent of the Senate. Under the provisions of Section 10778, R. S. Mo. 1939, it is provided that the Board of Curators of Lincoln University shall be organized after the manner of the Board of Curators of the State University of Missouri, and that they shall have the same general powers and authority.

In regard to the State teachers colleges, they are divided into five districts, known as the Northeast Missouri State Teachers College, Central Missouri State Teachers College, Southeast Missouri State Teachers College, Southwest Missouri State Teachers College and Northwest Missouri State Teachers College, and all of these teachers colleges are under the general control and management of their board of regents, which for each school are appointed by the Governor, with the advice and consent of the Senate.

There is no statutory provision in regard to the payment of tuition in the various state teachers colleges, and if the board of regents of any of the state teachers colleges desires to admit veteran trainees upon a non-resident tuition basis as contemplated by the provisions of the Veterans Administration service letter mentioned supra, we find that the acceptance of these students upon such basis is not "in conflict with Missouri laws or other legal requirements" so as to preclude the various state teachers colleges from receiving tuition for trainees on a non-resident basis from the Veterans Administration.

Conclusion

Therefore, it is the opinion of this department that (1) the University of Missouri, under the laws of the State of Missouri, is permitted to charge and receive from the Veterans Administration tuition fees for all veterans properly enrolled as students under the provisions of Public Law 346, 78th Congress (Servicemen's Readjustment Act of 1944), based upon the non-resident tuition fees as ordered and approved by the Board of Curators of the University of Missouri; (2) Lincoln University, under the laws of the State of Missouri, is permitted to charge and receive from the Veterans Administration tuition fees for all veterans properly enrolled as students under the provisions of Public Law 346, 78th Congress (Servicemen's Readjustment Act of 1944), based upon the non-resident tuition fees as ordered and approved by the Board of Curators of Lincoln University; and (3) the Northeast Missouri State Teachers College, Central Missouri State Teachers College, Southeast Missouri State Teachers College, Southwest Missouri State Teachers College and Northwest Missouri State Teachers College, under the laws of the State of Missouri, are permitted to charge and receive from the Veterans Administration tuition fees for all veterans properly enrolled as students under the provisions of Public Law 346, 78th Congress (Servicemen's Readjustment Act of 1944) based upon the non-resident tuition fees as ordered and approved by the Board of Regents of the various state teachers colleges.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

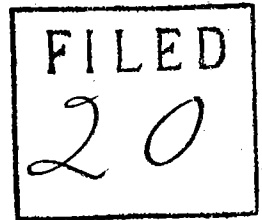
APPROVED:

J. E. TAYLOR
Attorney General

AVO:EG

SHERIFFS: Reports required to be made in third class counties.

May 24, 1946



6/3
Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date, requesting an opinion of this department, reading as follows:

"The opinion of your department is desired in connection with the question as to just what reports are required to be made by the Sheriff of a County where the population, as shown by the last census, is between 20,000 and 25,000. Should a monthly report be made for board of prisoners and also for all fees, both civil and criminal? In addition should a quarterly report be made to the County Court?"

It is well settled that the collection of fees by a public official must have a statutory basis. Sections 13411 and 13414, R. S. Mo. 1939, provide for the fees that a sheriff is entitled to, both civil and criminal. Section 13416, R. S. Mo. 1939, provides for the amount of compensation that he shall be allowed for boarding prisoners. These sections do not provide for any reports to be made by him to the county court.

Section 13444, R. S. Mo. 1939, provides for the manner in which a sheriff must keep an account of all fees collected by him. He must then account quarterly to the county court for all fees he has received as provided by Section 13450, R. S. Mo. 1939, which reads, in part, as follows:

"* * * After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him

received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Therefore, it can readily be seen from a reading of the above statutes that the only report that is required of the sheriff to be made to the county court for the collection of fees is a quarterly one.

Section 13774, R. S. Mo. 1939, provides for the manner in which a sheriff may report the boarding of prisoners to the county court, and reads, in part, as follows:

"Hereafter when any person or persons shall be confined in the common jail for any criminal offense, the sheriff or jailer may make out and present to the county court at its regular session, a bill for all board due him for the board of such prisoners; * * * * *

The verb "may" may be, and usually is, employed as implying permissive and not mandatory action or conduct. State v. The Han. & St. Joseph RR. Co., 51 Mo. 532. Therefore, the above statute does not make any report for the boarding of prisoners mandatory, but if the sheriff so desires he may make his report at the regular session of the county court. If he does not make any such report, then the county court can require him to do so under Section 13839, R. S. Mo. 1939, which provides as follows:

"It shall be the duty of all courts of record, at each term thereof, to settle with the sheriffs or marshals for all moneys by them received; or which they ought to have collected, for the use of their respective counties, and have not before accounted for. They shall cause their clerks to make out a list of all sums chargeable to said sheriffs or

marshals and payable to the counties, specifying on what account, and cause the same to be certified under the seal of the court, which certificate shall be immediately transmitted to the clerks of the county courts of the counties to which such moneys are payable who shall charge the same accordingly."

The county courts were created by Article VI of the Constitution of Missouri, 1875. They are courts of record and would come within the above statute. Article VI, Sec. 36, Constitution of Missouri, 1875, provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 13839, supra, requires the report at each "term." The terms of the county court are provided for in Section 2485, R. S. Mo. 1939, which reads as follows:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: Provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county

seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

By reading the above sections of the Statutes, and the one section of the Constitution, together, we are of the opinion that the sheriff may make a report at each regular session, but if he does not he is required to make one at each term of the county court. It should be noted here that if the sheriff does make a report at each regular session he is required, under Section 13839, supra, to account only for that which he has not before accounted.

It is interesting to note that House Bill No. 899, passed by the 63rd General Assembly and approved by the Governor, provides for monthly reports by the sheriff to the county court of all fees, both civil and criminal, and a monthly report for the boarding of prisoners. This bill was approved by the Governor on April 19, 1946, but does not become effective before July 1, 1946.

The sheriff has a further report to make in connection with partition sales, as provided by Section 1753, R. S. Mo. 1939, but this is not a regular report, nor is it one to be made to the county court.

Conclusion

Therefore, it is the opinion of this department that a sheriff, of a county whose total population by the last census is between 20,000 and 25,000, (1) is required to make a report of all fees, both civil and criminal, quarterly to the county court, and, (2) is required to make a report at each term of the county court for the boarding of prisoners, if he has not before accounted for same.

Respectfully submitted,

APPROVED:

PERSHING WILSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

PW:CP

SCHOOLS:
COUNTY COURTS:

RE: The county court must pay clerical help of the superintendent of schools in Mississippi County within the limits prescribed in HCSHB No. 770.

July 23, 1946

FILED

20

8/30

Mr. Marshall Craig
Prosecuting Attorney
Charleston, Missouri

Dear Mr. Craig:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department as follows:

"Section 10622.1 Laws of Missouri June 1946, states in part, " * * * the County Superintendent of Public Schools shall be permitted to employ clerical assistance, * * * ".

"We would like to have the opinion of your department with reference to whether or not any discretion is left with the County Court in the hiring of clerical help for the County Superintendent. In other words does the above section mean that the County Court must pay a clerical for the Superintendent of Schools if he desires that one be employed.

"The County Superintendent of Schools in the County, which is a County of third class, desires to have clerical help, but the County Court feels that it is not necessary and wants to know whether or not they have authority to refuse his request."

The statute relating to the clerical assistance of the county superintendent of schools in third class counties, of which Mississippi County is one, is Section 10618.2 of HCSHB No. 770, passed by the 63rd General Assembly and approved by the Governor, and effective ninety (90) days from April 2, 1946. This section reads as follows:

"Sec. 10618.2 Traveling expenses--clerical assistance

"The county superintendent of public schools

shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred fifty dollars (\$750) nor more than one thousand five hundred dollars (\$1500) annually to be determined and fixed by the county court, seven hundred fifty dollars (\$750) of which shall be paid by the state out of state school moneys, the same to be included by the State Board of Education as a part of the apportionment made before August 31 of each year. The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state: Provided, when the county superintendent shall furnish his own conveyance the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled: Provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services, and in no case shall the county superintendent personally receive any part thereof."

The legal issue to be determined here is whether the word "shall" at the beginning of the second sentence in that section, is mandatory or directory.

In State ex rel. McKittrick v. Wymore, 119 S. W. 941, 343 Mo. 98, the court said, 1. c. 109:

"* * *It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. * * *"

Other courts of Missouri have stated the law to be that the construction of the words "may" and "shall" have to be determined by ascertaining the intent of the Legislature in passing the statute. *Kansas City v. J. I. Case Thrashing Machine Co.*, 87 S. W.(2d) 195, 337 Mo. 913. This intent may be determined by bearing in mind the object of the statute and the consequences that would result from construing it in one way or the other. *State ex rel. Hay v. Flynn*, 147 S. W.(2d) 210, 235 Mo. App. 1003. Applying the above rules of construction we think the statute is mandatory for the following reasons: (1) The general rule is that the word "shall" is mandatory. (2) The effect of allowing the county court of a county to refuse a county superintendent clerical help might lead to the obstruction and embarrassment of the officer in carrying out his duties with relation to the schools of the county. Section 10618.2 insures that the county superintendent will not abuse this privilege because it provides a maximum which the clerical assistants of the superintendent will be entitled to receive. Therefore, if the county court were allowed to refuse the superintendent any clerical assistance the result would be that, while the superintendent is restricted by the statute in hiring assistance the county court would not be restricted in its exercise of authority over the superintendent. We are of the opinion that the statute did not so intend, and this is supported by the fact that the statute also provided that clerical assistants should receive not less than seven hundred and fifty (\$750) dollars per year. The latter indicates an intent upon the part of the Legislature that the superintendent be given the clerical assistance if he deemed it necessary to carry out his duties. (3) The object of the statute was that the superintendent carry out efficiently his duties with regard to the public schools and we think that this object might be thwarted if the county court was allowed to refuse to give him any clerical assistance.

We are, therefore, of the opinion that the first "shall" in the second sentence of Section 10618.2 of HCSHB No. 770 is mandatory.

CONCLUSION

It is, therefore, the opinion of this Department that the county court of Mississippi County must pay clerical assistance of the superintendent of schools of that county if the superintendent desires and requests that such assistance be employed. The county is, however, not authorized to pay such clerical assistance more than the fifteen

Mr. Marshall Craig

-4-

hundred (\$1500) dollar maximum per year which is provided in Section 10618.2 of HCSHB No. 770.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

QUARANTINE:

State Veterinarian, under Sec. 14195, 2.S. 1939, may quarantine chickens infected with Newcastle disease. The Governor, under Sec. 14207, may issue proclamation quarantining areas in which Newcastle disease is widely disseminated or epidemic. State Veterinarian, or his deputy, may quarantine chickens infected with or which have been exposed to infection by Newcastle disease when offered for sale at a community sale. No authority exists for any state officer to order destruction of chickens.

September 11, 1946

FILED

20

Dr. H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of August 1, 1946, requesting an official opinion of this department, and reading as follows:

"It has recently been brought to my attention that symptoms of Newcastle disease have appeared in baby chicks shipped from commercial hatcheries in Missouri. This being a highly infectious disease, it is necessary that prompt measures be taken to prevent its dissemination. Among the recommendations by the National Committee on Newcastle Disease is one that local quarantine of infected flocks be established.

"The question has presented itself to this department as to the extent of its authority, or the authority of any other state official to establish such local quarantined areas. We request an opinion giving us an outline of the authority of any state officials with respect to the establishment of such quarantined areas, and the promulgation of necessary rules and regulations to enforce such quarantine as established.

"As correlative to the question of the authority to establish a quarantine, the question arises as to the liability for the destruction of the flocks in which the disease is found.

As a part of the control measures advocated by the National Committee, destruction of other birds found in the flocks in which affected individual birds are located is advised. With respect to such birds that are not found to be actually infected at the time of imposition of quarantine, an element of salvage will be present, inasmuch as they may be slaughtered and used for human consumption.

"We will further appreciate being advised as to this particular phase of the imposition of the quarantine."

The authority for quarantining chickens infected with or exposed to infection by Newcastle disease is found in the Community Sales Act, Laws of Missouri, 1943, pages 310-315, inclusive, and Sections 14195, 14207, and 14027, R. S. Mo. 1939.

Section 10 of the Community Sales Act, found at page 314, Laws of Missouri, 1943, provides that the State Veterinarian, or his deputy, may order any livestock vaccinated or quarantined when he thinks such action advisable, when such stock is offered for sale at a community sale.

Section 2 of the Community Sales Act provides, in part:

"The term 'livestock' shall mean and include cattle, swine, sheep, goats, and poultry."

From the definition of "livestock" found in Section 2 of the Community Sales Act, it is clear that chickens are included in the provisions of the Act. Under the provisions of Section 10, the State Veterinarian, or his deputy, may quarantine chickens which are infected with or have been exposed to infection by Newcastle disease, when such chickens are offered for sale at a community sale. In the Community Sales Act there is no provision for the State Veterinarian, or his deputy, to order any chickens slaughtered.

Section 14195, R. S. Mo. 1939, provides, in part, as follows:

"If, upon investigation, said veterinary surgeon shall be satisfied that such live-stock is suffering from or infected, or capable of infecting with or causing what is known as glanders, farcy, tuberculosis, con-

tagious pleuro-pneumonia, Texas fever, rinderpest, foot and mouth disease, or any other dangerous disease of a contagious, infectious or spreading character, against which he may think best to quarantine, he shall immediately quarantine the same by placing it in pens, barns or sheds, or fields, completely separated from other susceptible stock not so diseased or infected, until such diseased stock shall be disinfected or completely recovered, and its release ordered by the state veterinary surgeon or his deputies, or shall have been killed or disposed of as herein-after provided; * * * The said veterinary surgeon may, in his discretion, order owner or owners, or person or persons in charge, to bury or burn carcasses of dead animals, and such persons thereupon shall execute such order as prescribed." (Emphasis ours.)

The question of the quarantine power of the State Veterinarian under Section 14195 depends upon whether or not the term "livestock," as used in this section, includes chickens.

Section 14027, R. S. Mo. 1939, provides, in part:

" * * * The commissioner is hereby clothed with the power of reasonable quarantine in relation to the regulatory laws of the state department of agriculture; and it is further provided, that the power of quarantine in relation to livestock diseases shall include poultry. * * * "

Section 14190, R. S. Mo. 1939, provides that the Commissioner of Agriculture shall appoint the State Veterinary Surgeon. Section 14194, R. S. Mo. 1939, provides that the Commissioner of Agriculture shall cause an investigation preliminary to the imposing of a quarantine under the provisions of Section 14195, above quoted.

The State Veterinarian, when imposing a quarantine under the provisions of Section 14195, R. S. Mo. 1939, is acting for the Commissioner of Agriculture, and the provision in Section 14027, above quoted, that the power of quarantine in relation to livestock diseases shall include poultry applies to the quarantining power regarding livestock provided for in Section 14195, R. S. Mo. 1939, which is one of the regulatory laws of the State Department of Agriculture. Since this is

true, there is power in the State Veterinarian, under the provisions of Section 14195, to quarantine chickens suffering from or infected or capable of infecting with Newcastle disease. However, further sections in Article 11, Chapter 102, R. S. Mo. 1939, in which Section 14195 is found, provide for the appraisal and slaughter only of horses, mules, cattle, hogs, sheep, or goats infected with or capable of communicating certain diseases to other animals. There is no provision in this section for the ordering of the slaughter of chickens. The State Veterinarian does have power, under the provisions of Section 14195, to order the owner of chickens to bury or burn the carcasses of chickens which die from Newcastle disease.

Section 14207, R. S. Mo. 1939, provides as follows:

"The governor, when informed by the State Veterinarian that either contagious pleuropneumonia, rinderpest, foot and mouth disease, maladie du coït, Bang's disease, or any other contagious or infectious livestock disease has become largely disseminated or epidemic among domestic animals throughout any municipality or geographical district in this state, or is found to exist in any herd or herds in this state, may call the commissioner of agriculture and the state veterinarian together, and said commissioner and said veterinarian shall, if deemed necessary to eradicate, or prevent the spread of such disease formulate for the state veterinarian and the county courts rules and regulations under which stock capable of carrying said diseases, or any of them shall be permitted to move to other parts of the state; such rules and regulations shall be subject to the approval of the Governor, who thereupon shall issue his proclamation scheduling and quarantining such localities, and forbidding the carrying or transportation or moving of all domestic animals of the kind diseased from such municipalities or district or county to another, or from one premises to another, or over any public highway or any lot or ground not sufficiently fenced to prevent animals from going through or from being brought into

such infected districts, municipalities or counties except in accordance with the aforesaid rules and regulations. The county court or other legally substituted court of the county in which such infected locality or district shall have been quarantined by the Governor, shall be notified by the state veterinarian, and furnished with copies of said regulations. Said county court shall thereupon comply with said rules and regulations, and issue order to the sheriff to assist said state veterinarian in carrying out the provisions of the same."

Since the rules and regulations formulated for the Governor's approval, under the provisions of Section 14207, are drawn up by the State Commissioner of Agriculture and the State Veterinarian, the provision of Section 14027 which provides that the power of quarantine in relation to livestock diseases shall include poultry applies to the quarantining power provided for in Section 14207, which is one of the regulatory laws of the State Department of Agriculture. There is no provision in Section 14207 for ordering the slaughter of chickens, but the Governor may, under such section, issue a proclamation quarantining a municipality or geographical district of the state if Newcastle disease becomes largely disseminated or epidemic among chickens throughout any municipality or geographical district of the state.

CONCLUSION

Under the provisions of Section 14195, R. S. Mo. 1939, the State Veterinarian may quarantine chickens infected with Newcastle disease, and may order the owner to bury or burn the carcasses of chickens which have died from Newcastle disease. Under the provisions of Section 14207, R. S. Mo. 1939, the Governor may, by proclamation, quarantine areas in which chickens are infected with Newcastle disease. Under the provisions of the Community Sales Act, found at page 310, Laws of Missouri, 1943, the State Veterinarian, or his deputy, may quarantine chickens which are infected with or have been exposed to infection by Newcastle disease, which are offered for sale at a community sale. There is no statutory authority

Dr. H. E. Curry - 6

for any state officer to order the slaughter of chickens infected with Newcastle disease.

Respectfully submitted,

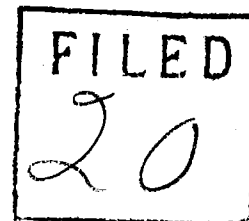
C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

TAXATION AND REVENUE: Liability for filing return of intangible personal property by resident beneficiary of trust estate.



September 23, 1946

9/27

Honorable Claude E. Curtis
Prosecuting Attorney
Laclede County
Lobanon, Missouri

Dear Sir:

Reference is made to your letter of recent date requesting an official opinion of this office, and reading as follows:

"Your legal opinion is desired concerning the operation of the new intangible property tax law.

"My facts are: A person in Laclede County, Missouri, receives her sole income from a trust estate situated in the state of New York. She has always reported this income for state and federal income tax purposes and in 1945 she paid income taxes on the total yield of said trust estate.

"It is contended that if such person must return said yield under the new law, then she is being doubly taxed. Is this true, and if so, is it illegal under the next tax act?

"Will you please advise whether such person must report her said income and pay intangible property taxes thereon?"

You have not indicated in your letter the exact nature of the intangible personal property comprising the trust estate of which the Missouri resident is the beneficiary. We, therefore, deem it of importance to quote the definition of intangible personal property found in H.C.S.A.B. 868 of the 63rd General Assembly, which provides the scheme for the taxation of such property. Paragraph (2) of Section 1 of said act reads as follows:

"(B) Intangible personal property means moneys on deposit; bonds (except those which under the constitution or laws of the United States may not be made the subject of a property tax by the State of Missouri); certificates of indebtedness (other than capital notes issued by banks or trust companies); notes, debentures, annuities, accounts receivable; conditional sales contracts (which have incorporated therein promises to pay) and real estate and chattel mortgages."

Upon determination that all or part of the corpus of the trust estate consists of property of the nature defined in the above quoted portion of the act, we then must look to further provisions thereof to determine whether or not the resident of Missouri is required to make return of such property. Paragraph (D) of Section 1 of the act reads in part as follows:

"(D) The taxable situs of intangible personal property for the purpose of this act shall, for residents of Missouri, be the residence of the owner thereof. * * * "

Also your attention is directed to a portion of Section 6 of the act, reading in part as follows:

"* * * In all cases where the legal title is not held in this state the person holding the equitable title or beneficial interest shall be liable for the tax.* * *"

There is one exemption provided by the act which might be applicable in the present instance. This exemption is found as a part of paragraph (D), reading as follows:

"* * * All intangible personal property of persons residing in this state but used in or arising out of business transacted outside of this state by, for or on behalf of such persons and taxed in such other state or states shall not be subject to the intangible property tax in this state.* * *"

We note that some contention is being made that to subject the intangible personal property to taxation in Missouri would

amount to double taxation by reason of the fact that the income from such intangible personal property has been subject to Federal and state income taxes. This contention is not tenable, however, as the tax provided by H.C.S.H.B. 868 is not an income tax but merely adopts as a basis for valuing intangible personal property the yield derived therefrom. It is in no sense an income tax, but is an ad valorem tax based upon the value of intangible personal property arrived at in the manner mentioned.

CONCLUSION

In the premises, we are of the opinion that a resident of Missouri, owning the beneficial interest in a trust estate consisting of intangible personal property as defined in paragraph (B) of Section 1 of H.C.S.H.B. 868 of the 63rd General Assembly, must return such intangible personal property for taxation, unless such intangible personal property is used in or arises out of business transacted outside of this state by, for or on behalf of such person and is taxed in such other state or states.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:LR

AUTOMOBILES: IN RE: The members of a partnership may operate cars
LICENSES: owned by them without taking out a registered
operator's license.

October 4, 1946



Honorable Marshall Craig
Prosecuting Attorney.
Charleston, Missouri

Dear Mr. Craig:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department as follows:

"The State highway patrol has a problem in this section with reference to operator's licenses. A typical case is the one at Wyatt concerning the Wyatt Alfalfa Mill. The patrolman felt that the members of the partnership who operated trucks for the mill should have an operator's license. He talked to them about it and they wrote the Motor vehicle department. The letter and the answer are as follows-in part:

"Sept. 4, 1946.

* * *Wyatt Alfalfa Mill consists of four partners, each with a one fourth interest. We dehydrate alfalfa meal, which is made from green hay hauled from fields to the mill. The federal Government calls this hauling and field work 'farm operations.' We have a pick up truck that is used to supervise this work between mill and fields. Would all four partners have to have operators license to drive any of these trucks? None of these trucks are for hire, and are used for our sole use.

"We have a pick up truck owned by Mildred R. Smith, U. G. Raffety, and Hunter Raffety, sister and two brothers. It is a farm truck used to haul men and small equipment used in our farm operations only. The truck has M. U. G. on the door for the

three, and the ownership is made out - Mildred R. Smith, or U. G. Raffety, or George Hunter Raffety. Would we have to all three have operator's licenses to drive this truck."

"(Answer from the department of Revenue)

"Sept. 10, 1946

"In reply to your letter of September 4, we wish to advise that Missouri Operator's license are not necessary if the vehicle in question is not for hire.

Hinkle Statler
By L. N. Alsbrook'

"We would like an opinion from your office concerning this problem. I believe that the parties are correct in saying that the trucks are not for hire and I am sure that they want to comply with the law. As I understand their situation they purchase alfalfa from farmers and it is hauled to the mill. I don't know whether they buy it in the field or at the mill, but I am sure that their trucks are not hired out and operated by others than their employees or themselves. I believe that it has been ruled that members of a corporation who operate trucks of the corporation must have operator's license. the question is whether the same rule applies to partners in a partnership.

"We are not asking your office to make a contrary ruling to the motor vehicle department, but we want to make sure that we have the correct ruling.

"An opinion on this question would be greatly appreciated."

Section 8372, House Bill 132, Laws 1945, page __ reads, in part, as follows:

"(a) Every person desiring to operate a motor vehicle as a chauffeur shall file in the office of the commissioner a statement containing his name, age, address and other information that the Commissioner of Motor Vehicles may deem necessary, on a blank to be furnished for that purpose by the commissioner."

Section 8373, R. S. Mo. 1939, reads, in part, as follows:

"Registration of registered operators

"(a) Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing his name, age and address, and the trade name and motive power of the motor vehicle he is competent to operate, on a blank to be furnished by the commissioner for that purpose, which shall be indorsed by two citizens of this state who are registered motor vehicle owners, who shall certify to the correctness of the facts stated in such application and the good character of such applicant."

The word "chauffeur" is defined in Section 8367, Senate Bill #360, as follows:

"'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire.* * *"

The word "registered operator" is defined in Section 8367, supra, as follows:

"'Registered operator.' An operator other than a chauffeur who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment,

but whose principal occupation is not the operating of such motor vehicle.* * *

From the above definitions it is clear that if the motor vehicle is not carrying passengers or property for hire the operator is not required to have a chauffeur's license. In your letter you state that none of the trucks of the partnership in question are used for hire, but all of them are used solely in the business of the partnership, this business not being a business for the purpose of carrying passengers or property for hire.

In order to be a "registered operator" a person must, among other things, (1) be operating a motor vehicle of another person, (2) must be an employee of that other person. From the facts stated in your letter, we think that these two requirements are not to be found in the case of the partnership which runs the Wyatt Alfalfa Mill. From those facts we gather that the partners themselves are operating vehicles and they own them. They are, therefore, not operating a motor vehicle of another person. In the second place, they are not employees but are themselves the owners of the business.

The Driver's License Division of the Department of Revenue has, in the past, ruled that members of a partnership who are driving motor vehicles owned by the partnership in partnership business are required, for this purpose, to obtain only the ordinary operator's license, which is more commonly known as a "driver's license". We think that the "operator's license", to which you refer in your letter, is the "registered operator's license", and we have so considered it in writing this opinion.

CONCLUSION

It is, therefore, the opinion of this department that, under the facts set out in your letter, the partners of the Wyatt Alfalfa Mill are not required to obtain registered operator's licenses in order to lawfully operate the trucks of the partnership which are being used solely in the operation of the business.

Respectfully submitted,

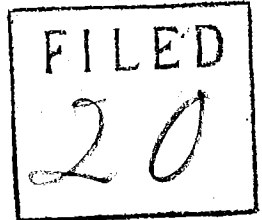
APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

SNC:mw

SURVEYORS' COUNTY: County surveyor must sign 'record of surveys' and same cannot be signed by deputy or third persons.
County Surveyors:



October 14, 1946

Mr. Marshall Craig
Prosecuting Attorney
Charleston, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"We would like to have an opinion from your office with reference to Chapter 90, Revised Statutes of Missouri, 1939, and particularly Section 13202.

"The question has arisen as to whether or not anyone other than the duly elected and qualified surveyor can sign the 'Record of Surveys' in the office of the Recorder of Deeds, or whether any changes can be made in those records by anyone other than the duly elected and qualified surveyor."

Section 13190, R. S. Mo. 1939, provides for a county surveyor in each county of this state. Section 13203, R. S. Mo. 1939, provides that county surveyors may appoint deputies. Section 13202, R. S. Mo. 1939, provides, in part, as follows:

"The county surveyor of every county or city shall: First, keep a fair and correct record of all surveys made by himself and his deputies, in a well-bound book, with a convenient index, to be procured at the expense of the county or city for that purpose, which books and indexes shall be the property of such county or city, and shall be known as the 'record of surveys,' and every such surveyor shall record in such book a full and complete description of all corners

established by him or his deputies, within two weeks after the survey has been certified to, and such books shall be preserved by the recorder of deeds the same as the records of conveyances of such county or city and subject to inspection by any person interested therein, under the supervision of the recorder of deeds for such county or city; * * * "

The general rule as to the construction of statutes which impose duties upon public officers is given in 59 Corpus Juris, Section 633, page 1076, as follows:

" * * * Statutes * * * which confer a public body or person with power to perform acts which concern the public interest * * * are generally regarded as mandatory, * * * "

In the case of Carter v. Hornback, 139 Mo. 238, 40 S. W. 893, the court had before it the following situation, l. c. 242:

"Upon the trial plaintiff offered in evidence what purported to be the 'Record of surveys of Jasper county, Missouri,' and particularly a resurvey therein numbered 71. Defendant objected to the introduction of this survey in evidence, upon the ground that it did not purport to have been made by the county surveyor of said county, and was not signed by him, but was signed 'E. Lloyd, Deputy County Surveyor.' The objection was sustained, plaintiff saved his exceptions and assigns for error the ruling of the court in excluding the record of the survey from the consideration of the jury."

The court, in holding that such signature by the deputy county surveyor was not proper, said:

"By section 8320, Revised Statutes 1889, section 7390, Revised Statutes 1879 authority is given to any county surveyor to appoint deputies, but it is a well settled rule of law that all official acts done by a deputy must be done in the name of the principal. A deputy is one who, by

appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable.' 5 Am. and Eng. Ency. of Law 623.

"As the survey was not made in the name of the principal it was not an official act, and was not, therefore, entitled to record, and no error was committed in excluding the record of the survey from the consideration of the jury.

"But it is claimed by counsel for plaintiff that it was proven that Lloyd was in fact deputy county surveyor, and also that his survey was made by mutual consent of the parties then interested, and therefore the record was admissible. We must confess our inability to see the force of this argument. Such evidence did not make it an official survey, and it was only as such that it was entitled to record in the record of surveys of the county, and it is only under these conditions that the record or a duly certified copy thereof can be received in evidence. Now, if the survey was made by mutual consent of the parties to the suit it would have been competent evidence. R. S. 1899, sec. 8312. But the record would not be competent evidence even then, while the original would be."

Under authority of the above case, it will be seen that a "record of surveys" may not be signed by a deputy county surveyor as such. However, as pointed out in *Halter v. Leonard*, 223 Mo. 286, 122 S. W. 706, a report of a county surveyor made in his name by his deputy is valid, because "it is a well settled rule of law that all official acts done by a deputy should be done in the name of the principal." Therefore, it would appear that the "record of surveys" must be signed by the county surveyor himself or in his name by the deputy county surveyor, and the signing by a deputy county surveyor in his own name, or by a third person, is illegal and of no official standing.

As to the right of any person other than the county surveyor to change the "record of surveys," it is well settled in this state that the survey of a county surveyor is prima facie correct, but is not conclusive, and may be disproved by any

Mr. Marshall Craig - 4

competent evidence. Morris v. Nowell, 180 S. W. (2d) 717; Jones v. Eaton, 307 Mo. 172, 270 S. W. 103. Therefore, if it should be adjudged by any court of competent jurisdiction that a survey contained in the "record of surveys" was incorrect, then such survey should be changed. However, in view of what has been said above, such corrected "record of surveys" must be signed by the county surveyor or by the deputy county surveyor in the name of the county surveyor.

CONCLUSION

It is, therefore, the opinion of this department that the "record of surveys" required by Section 15202, R. S. Mo. 1939, must be signed by the county surveyor or by the deputy county surveyor in the name of the county surveyor, and no third person has authority to perform this act. The same rule applies if a survey in the "record of surveys" is adjudged incorrect and said survey is corrected by the county surveyor or his deputy.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO:HR

PROBATE CLERK: In counties wherein probate judge and magistrate judge are one, the probate and magistrate clerk may practice law in all courts except the probate and magistrate court.

October 29, 1946

FILED

20

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

Receipt of your recent request for an opinion from this department is hereby acknowledged. The question presented is whether or not, in counties wherein the probate judge is also judge of the magistrate court, the clerk of the probate and magistrate court may practice law in the other courts of such county.

Section 2024, R. S. No. 1939, referred to in your request, provides as follows:

"No judge of any court of record, except judges of the county courts, shall practice or act as counselor or attorney in any court within this state, except as otherwise permitted by law: Provided, that no such judge shall practice or act as counselor or attorney in any cause pending in any court of which he is judge, nor shall any clerk or deputy clerk, while he continues to act as such, plead, practice or act as counselor or attorney in any court within the county for which he is such clerk or deputy clerk, in his own name or in the name of any other person, under any pretense whatever." (Underscoring ours.)

The solution to your question depends upon whether or not the words " * * for which he is such clerk or deputy clerk * *" refer to the word "court" or the word "county." Of course,

each sentence, phrase, and word should be given some meaning if possible. *Norberg v. Montgomery*, 173 S. W. (2d) 387, 351 Mo. 180.

Section 2024, quoted *supra*, is found in Chapter 10, Article 1, R. S. Mo. 1939, and that particular chapter and article deal with the general powers and duties of courts of record. It is, therefore, apparent that the underscored portion of Section 2024 refers to the clerks of the various courts and not the clerks of the county. With that reference in mind, Section 2024 may be interpolated, in the present situation, to read that, the clerk of the probate and magistrate court, while he continues to act as such, may not plead, practice, or act as counselor or attorney in the probate and magistrate court within the county for which he is such clerk. This does not preclude him from practicing law in those other courts in the county for which he is not a clerk, which would, of course, include the circuit court.

In substantiation of this, Section 2026, R. S. Mo. 1939, provides:

"No judge, justice of the peace, clerk or deputy clerk of any court shall have any partner practicing in the court of which he is judge or justice, clerk or deputy clerk."

This is merely a further safeguard against the same evil. Section 2024, quoted *supra*, was originally enacted in the Laws of 1881, page 97, and was reenacted in the Revised Statutes of 1885, page 160, Section 54. Section 2026, quoted *supra*, was originally enacted in 1885 and is found first, along with the present Section 2024, R. S. Mo. 1939, in the Revised Statutes of 1885, page 160, as Section 55. Apparently, Section 2026, R. S. Mo. 1939, was intended to plug the loop-hole left by Section 2024. Therefore, these two sections may be read together to find the purpose of both. Following this purpose to its logical conclusion, the result would be that neither the clerk nor his partner could practice law in that court in which the clerk officiated. This further leads to the result that neither the clerk nor his partner should be precluded from practicing law in other courts of that county.

Conclusion

It is, therefore, the opinion of this department that in counties wherein the probate judge is also judge of the magistrate court, an attorney who is the clerk of the probate and magistrate court, shall not plead, practice, or act as counselor or attorney in any probate or magistrate court within the county for which he is such clerk while he continues to act as such. He may, however, practice law in any other court within the county.

Respectfully submitted,

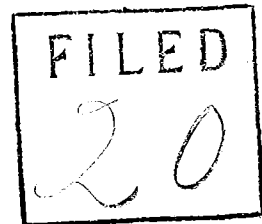
J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

SCHOOLS: Directors of common school districts can employ attorneys to defend mandamus action if they are acting in good faith.



November 14, 1946

11/25

Mr. Marshall Craig
Prosecuting Attorney
Charleston, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"We would like an opinion on the following matter. The voters in a common school district petitioned the board of the district to call an election for the purpose of voting on whether they would combine with an adjoining consolidated school district. The board refused to call the election and the petitioners brought a suit in mandamus to compel the election. The question which has arisen is whether the common school district can use the school funds for the purpose of hiring counsel and paying costs in the defense and appeal of that mandamus suit."

Section 3349, R. S. Mo. 1939, reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

In view of the foregoing statute, it is necessary to determine whether the employment of an attorney by a common school district is within the scope of the powers of such district or is expressly authorized by law. We find no statute which expressly authorizes a school board of such a district to employ an attorney. However, it is a well established principle of law that where express powers are granted public officers, such implied powers as are necessary to make the express powers effective are also granted. In

State ex rel v. Wymore 132 S.W. 2d, 979, 987, 345 Mo. 169, the rule was stated as follows:

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, P. 515."

While the Courts have not expressly ruled that school boards have the power to employ attorneys, they have impliedly so ruled. The case of Page v. Township Board of Education 59 Mo. 264, was a case where an attorney had sued a school district for compensation for legal services rendered the district. In discussing the case the Court said:

"This was a suit to recover an attorney's fee of fifty dollars. There was no dispute that the services were rendered, and that the fee was a reasonable one; but the court gave judgment for the defendant on the grounds that there was no written contract made with said school board, and no order entered on the minutes of the board at a regular or stated meeting of said board. The proof was that the attorney was employed verbally."

"The judgment will be reversed and the case remanded, with directions that a judgment for the \$50 be entered for the plaintiff;"

In the above case it was apparently assumed that the school board had power to employ the attorney, but the only question ruled on was whether his employment should have been in writing and made a matter of record.

Also in the case of Thompson v. School District 71, Mo. 495, 499, the Court said:

"Managing officers of other corporations may engage the services of attorneys without express delegation of power or formal resolutions to that effect. Western Bank v. Gilstrap, 45 Mo. 419; Turner v. C. & D. M. C. R. R., 51 Mo. 501; Southgate v. A. & P. R. R. R., 61 Mo. 89, and no good reason is perceived why the same rule should not obtain in instances like the present one."

Exigencies may arise, even in the concerns of a school board, which would compel the immediate employment of an attorney, when delay might prove greatly detrimental to the interests of the board. We, therefore, hold the reason of the rule above noted, applies as well here as in other instances. Of course, if we concede the power, without formal resolution, to employ an attorney, the usual results of such employment will follow as a necessary consequence."

Likewise, the case of Terry v. Board of Education, 84 Mo. App. 21, was a case where an attorney had sued a school district for compensation for legal services rendered the district. In that case the Court apparently assumed that the school board had authority to employ the attorney, but it ruled that the statute (now Section 3349, supra) prevented the attorney recovering because his contract was not in writing. In ruling the case the Court said, l.c. 25,:

"The legislature had full power to prescribe this mode of authenticating the contracts of school districts, and also to condition the enforceability of such contracts upon compliance with these requirements. It has done so. Hence the contract of plaintiff not being in accordance with the statute, imposed no obligation upon the former school board, nor upon the defendant as its successor, in duty, as well as in right."

From the above cases we believe it is clear that the Courts have impliedly recognized the power of school boards to employ attorneys when situations arise which necessitate the board having the services of an attorney.

It might be suggested that the suit you mention is really not a suit against the district but one against the directors personally. Its purpose is to compel the directors to do what the instigators of the suit assert is the duty of the directors. At first blush it might appear that it would be against public policy for the directors to be allowed to use public money to defend themselves from doing their duty. Of course, we are assuming that the directors are acting in good faith. If they are not, they would be liable to the district for any loss occasioned by their bad faith.

In the Page case, supra, nothing was said as to the nature of the services rendered by the attorney. In the Thompson case, supra, the Attorney was defending the district against a suit for money. However, in the Terry case, supra, the attorney had been employed, among other things, to defend the directors against an injunction suit. Nothing is said as to what the directors were to be enjoined from doing, but evidently the suit sought to restrain the directors from doing certain things which the instigators of that suit thought were illegal. The attorney was, therefore, employed to try to uphold actions of directors which were claimed to be illegal. In the case you present it is claimed the directors are violating the law, so there would seem to be no difference in your case and in the Terry case in that regard. If the directors call an election and a consolidation of districts is subsequently voted when in fact the election should not have been called according to law, it is apparent the district would suffer from the confusion which would result. It seems to us, therefore, that the directors are acting for the district when they honestly determine whether the election should be called. Of course, we have nothing before us to show whether the board should call an election or not. We are assuming that the board has determined that legally they should not call the election under the circumstances. As long as they are acting in good faith, they should not be compelled to employ attorneys personally to defend their actions.

C O N C L U S I O N

It is, therefore, the opinion of this office that directors of common school districts may employ attorneys to defend themselves against a mandamus action and pay such attorneys out of the school money so long as they act in good faith in refusing to do the things sought to be compelled by such mandamus action.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK/vlv

BOARD OF

ACCOUNTANCY: IN RE: Paragraph (c) Section 14911f, Laws of Missouri, 1943, prescribes alternative qualifications for individuals who apply for certificates as certified public accountants.

December 19, 1946

FILED

20

12/27
Mr. A. Henry Cuneo, Secretary
Missouri State Board of Accountancy
700 National Fidelity Life Building
Kansas City 6, Missouri

Dear Sir:

In reply to a request, submitted last December, for an official opinion, an opinion was submitted to you dated January 2, 1946, interpreting Section 14911f, paragraph (c), Laws of Missouri, 1943. That opinion has recently been reviewed and after further consideration and study has been withdrawn and the one herein contained, written on the same subject matter, shall be the official opinion of this department in lieu of the one previously submitted. Again we quote the letter containing the original request which reads:

"The Missouri State Board of Accountancy requests an opinion from your office on the meaning of Section 14,911f (c) of chapter 115 of the Revised Statutes of Missouri 1939, relating to the State Board of Accountancy, which reads as follows:

"Individuals who apply for a certificate as a certified public accountant must (except as otherwise herein provided):

(a) . . .

(b) . . .

(c) Be residents of this State, have an office therein for the regular practice of public accountancy, or be an employee of a certified public accountant practicing within this state."

"Your opinion is requested regarding whether Section 14,911f (c) means that the applicant must be a resident of this State and have an office in the State for the practice of public accountancy or be an employee of a

certified public accountant or a public accountant practicing within the State, or whether it means that the applicant must be a resident of this state or have an office therein or be an employee of a certified public accountant or a public accountant, etc."

The principal question involves the construction of paragraph (c) Section 14911f, Laws of Missouri, 1943. The primary consideration when construing a statute is to ascertain the intent of the Legislature and in this case the rule is stated in the case of *Artophone Corp. v. Coale*, 345 Mo. 344, 133 S. W.(2d) 345, 1. c. 347:

"* * *The primary rule of construction of statutes is to ascertain the lawmaker's intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.* * *"

Another important rule of construction is to give effect to the whole and every part of the statute. The several parts of the statute are to be construed in connection with every other part and all are to be considered as parts of a connected whole and harmonized if possible. *Norberg v. Montgomery*, 173 S. W.(2d) 387, 351 Mo. 180. Therefore, all of Section 14911f, supra, must be considered and given effect when construing any part thereof. For greater clarification, we quote Section 14911f:

"Individuals who apply for a certificate as a certified public accountant must (except as otherwise herein provided):

- (a) Be citizens of the United States;
- (b) Be over the age of twenty-one years;
- (c) Be residents of this State, have an office therein for the regular practice of public accountancy, or be an employee of a certified public accountant or a public accountant practicing within this State."

In examining the above section in its entirety we observe that paragraph (a), requiring the applicant to be a citizen of the United States, is set out separately, paragraph (b), requiring the applicant to be twenty-one years of age, is also set out separately. If the lawmakers intended that residency within the state was to be another requirement, it is our notion that they would have set out the requirement separately in another paragraph as they did the requirement pertaining to being a citizen of the United States and as to age.

Looking to the grammatical construction of paragraph (c) of Section 14911f, supra, we observe the use of the word "or". The use of the word "or" is disjunctive, denoting an alternative. So it was held in *Dodd v. Independence Stove and Furnace Co.*, 330 Mo. 662, 51 S. W. (2d) 114, from which the following is taken at S. W. 1. c. 118,

"* * *While the word 'or' may sometimes be so used, its ordinary use is as a disjunctive 'that marks an alternative generally corresponding to "either," as "either this or that."'
* * *"

In the case of *State v. McGee*, 83 S. W.(2d) 98, the word "or" was defined at 1. c. 110, as follows:

"* * *Or 'is a disjunctive participle that marks an alternative generally corresponding to "either," as "either this or that,"' 46 C. J. 1124, Sec. 1; *State v. Combs* (Mo. Sup.) 273 S. W. 1037, 1039 (1); *Dodd v. Independence S. & F. Co.*, 330 Mo. 662, 671 (8), 51 S. W. (2d) 114, 118 (9). 'A disjunctive conjunction coordinating two or more words or clauses each one of which in turn is regarded as excluding consideration of the other or others.'* * *"

The conclusion to be drawn from a study of the grammatical construction of paragraph (c) of Section 14911f, supra, is that the paragraph comprises a coordinated series of three requirements listed in the alternative and the possession of either would qualify the applicant to take the examinations for certified public accountants and entitle him to a certificate upon passing the examination. The conjunction "or" serves to join all three requirements with the purpose of separating them and does separate them with equal force and importance. Each requirement is excluded from being considered

in conjunction with the other, or others, and the possession of any one of them by the applicant would suffice.

To determine the meaning of paragraph (c) of Section 14911f, supra, we may also look to other related sections of the Act. Section 14911 (d) makes it mandatory on the Board to register firms and partnerships as certified public accountants if the following two conditions are met:

"(a) Each member or partner of the firm or partnership is in good standing as a certified public accountant in one or more states or political subdivision of the United States; and

"(b) Either

(1) Each resident or local member or partner is the holder of a valid certificate as a certified public accountant issued under the laws of the State; or

(2) If there is no resident or local member or partner then each resident or local manager is the holder of a valid certificate as a certified public accountant issued under the laws of this State."

That the Legislature did not wish to impose residency as one of the basic qualifications for the C.P.A. certificate is evident from the fact that they say that the local partner or local manager of the firm or partnership must be the holder of a certificate issued under the laws of this state.

There is no possibility of confusion in the meaning of the word "local" since it is defined in Section 14911(d) as follows:

"The term 'local', as used herein, is intended to denote persons engaged in practicing public accountancy in this State, who spend all or the greater part of their time during business hours in this State, but reside in another State."

If residency was one of the basic qualifications for obtaining a certificate the Board would be without authority to issue certificates to local partners or managers and Section 14911(d) would,

to some extent, be meaningless. To hold that residency is not a requirement for procuring a certificate would achieve greater harmonization of all sections of the Act.

CONCLUSION

In view of the foregoing, it is the opinion of this department that paragraph (c) Section 14911f, Laws of Missouri, 1943, prescribes three qualifications for individuals who apply for certificates as certified public accountants. That said qualifications are in the alternative and the possession of either would qualify the applicant to obtain a certificate provided the other two qualifications, as set forth separately in paragraphs (a) and (b), are possessed.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:mw

2 Smith
COUNTIES;

County Court cannot make donation to city for
municipal airport.

February 18, 1946

FILED
21

2/20
Honorable George M. Davis
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Davis:

This Department is in receipt of your request
for an official opinion which reads as follows:

"Money is being raised for preliminary survey for an airport. The County Court was asked to contribute. It was my opinion that they could not make such contribution. The airport would probably be a municipal airport of the city of Macon, but this is simply a preliminary survey; however, as a matter of public interest the parties wanted me to get your opinion on the matter so I am asking you whether or not the county court can make contributions to a preliminary survey for an airport. It would probably be a municipal undertaking of the city of Macon. This matter seems to be pressing and I would appreciate it, if I could have your very earliest opinion."

The question presented is, whether or not a county may contribute money to a city which is making a preliminary survey preparatory to the building of a municipal airport.

It is presumed from the facts given in your request that Macon County will have no interests or owner-

February 18, 1946

ship in said airport but that it will be entirely a city undertaking, so that Section 15123, R.S. Mo. 1939, which authorizes counties to own and operate airports, therefore, has no relation to the question at hand.

Section 23, Article VI of the Constitution of Missouri, 1945, provides as follows:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Section 25, Article VI of the Constitution of Missouri, 1945, states:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salariied members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

While there are no cases interpretating these Sections of the Constitution of 1945, however, Sections

February 18, 1946

46 and 47 of Article IV of the Constitution of 1875, which Constitution preceded the present one, had identical provisions therein.

Sections 23 and 25, supra, proscribe a county from granting public money to any corporation. As was pointed out in State ex rel. Board of Control vs. City of St. Louis, 216 Mo. 47, the term "corporations" includes both private and public corporations. In that case the Court quoted with approval the case of State of Missouri vs. Curators of State University, 57 Mo. 178, in which it is said, l.c. 93:

"* * * 'It is not pretended that the provision of the Constitution was complied with, but it is urged that the subscription or loan of credit of Phelps county to the University was to a public corporation, and therefore not within the meaning of the constitutional restriction. That the curators of the University constitute a corporation is not denied, but it is said that this provision of the Constitution was directed solely against subscriptions to private corporations. The language of the section makes no discrimination of this sort, nor does the main purpose of the prohibition require any such discrimination. What was the object of restriction on county courts, city and town municipalities? The object was plainly to prevent them from taxing the people without their consent. No loan or credit was allowed to any company, association or corporation without the consent of the people who had to pay it. The business of the company, association or corporation is not referred to in the Constitution. . . . What right, then, has this court to interpolate the word "private" into this section of the Constitution? The corporation to which the bonds in question were issued was in some respects a public corporation, and established for educational purposes--an object always held in high regard by

February 18, 1946

the State; but why is this object, however laudable, to overturn a plain provision of the Constitution, or to authorize a taxation which the Constitution forbids.'
* * * "

In State ex rel. Kirkwood vs. County Court of St. Louis County, 142 Mo. 575, the Court had before it the constitutionality of a law which required the County to expend money upon the streets of incorporated cities in which the county had no concern or control. The Court said, l.c. 584:

"* * * In all of their municipal and governmental affairs they (towns and villages) act independently of the counties in which they are located. So with respect to the counties, they have control through their proper officers of the road fund set apart for building and repairing roads. While by the act in question it is made the duty of the proper corporate authorities of cities, towns and villages to expend upon their roads, streets and public highways, the moneys obtained by them from the county court under the provisions of the act, no condition is imposed in the first place to their right to the money. They are entitled to it, if at all, absolutely and unconditionally. When the county taxes are collected and the money is paid in to the county treasury, it becomes public money, and the act of the legislature which authorizes the appropriation of any part of it to be expended upon the roads, streets and public highways of incorporated cities, towns and villages, in which counties have no concern or control, is a gift or grant within the meaning of that provision of the Constitution quoted, to such city, town or village. " (insert ours.)

February 18, 1946

Therefore, a constitutional provision against counties making gifts to corporations includes donations by a county to a municipal corporation over which they have no control.

The cases of City of Hannibal vs. Marion County, Missouri, 69 Mo. 571; State ex rel. vs. Taylor, 224 Mo. 393; State ex rel. Clark vs. Gordon, 261 Mo. 631, and Jasper County Farm Bureau vs. Jasper County, Missouri, 315 Mo. 560, 286 S.W. 381, do not announce a contrary doctrine because a reading of these cases all show that such gifts and grants were to an agency or sub-division of the particular entity making the gift.

As pointed out in State ex rel. vs. Taylor, 224 Mo. 393, which case approved a grant by a county to a drainage district, that said drainage district "is not independent of the county, but, upon the other hand, it owes its being to and is subject to the authority and control in the same sense in which townships of a county are subject to its control."

The rule announced herein has been supported in Bassille vs. Ramsey Co. 71 Minn. 198, Dady vs. Lyons 57 N.Y.S. 448 and Russell vs. Tate, 52 Ark. 541.

CONCLUSION.

It is, therefore, the opinion of this Department that a County Court may not make a contribution to a city for the purpose of a preliminary survey for a municipal airport.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

ROAD DISTRICTS: In re: Surplus monies in a Road District's Sinking Fund cannot be transferred to other funds for other purposes until the principal indebtedness and the interest thereon, has been extinguished.

March 8, 1946

FILED

21

4-4

Honorable Wilbur F. Daniels
Prosecuting Attorney, Howard County
Fayette, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an official opinion of this department, which letter reads as follows:

"I respectfully request your opinion as to whether or not the Fayette Special Road District can transfer money that it has in its sinking fund to the general fund in order that they may expend said sums accumulated in the sinking fund for the current upkeep and repair of their roads.

"The facts are that the sinking fund has built up considerable in excess of the sums required to retire interest and principal bonded indebtedness and the district desires to use said surplus for current repair."

Section 3279, R. S. 1939, in part, provides:

"The various counties in this state* * * and road districts in this state, are hereby authorized* * * to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, * * *"

The above quoted parts of Section 3279, supra, authorize the road districts in this State to fund their indebtedness. The term "road districts" first appeared in the Laws of 1931, at page 138, which provided for an entirely new section, the present section, in lieu of Section 2892 of the Laws of 1929. This is the first time that the term "road districts" appeared in the statutes.

Section 3282, R. S. Mo. 1939, provides as follows:

"Any county, city, village, town, township, parts of townships or school district, issuing its bonds for the purpose aforesaid, shall, at the time of issuing the same, provide in the express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due."

Herein lies the power for the establishment of a sufficient sinking fund for the payment of the incurred indebtedness and interest thereon. While section 3282, supra, does not specifically list "road districts", the case of School District vs. Day, 328 Mo. 1105, 438 S. W. (2d) 328, held that this section (section 3282, supra,) should be construed with Section 3279, supra, and also we believe the rule of pari materia applies, (State ex rel. Brokaw vs. Board of Education, 171 S. W. (2d) 75) so that the following sections apply to road districts, even though not specifically referred to in the particular section.

Section 3283, R. S. Mo. 1939, provides for the disposition of funds raised by the sale of bonds. In its applicable parts it provides as follows:

"When any bonds shall have been voted or may hereafter be voted, * * * the proceeds from the sale thereof, and all moneys derived by tax levy for interest and sinking fund, * * * shall be kept by the authorities of such town, city, township, county, drainage, levee, county or school district having control of said funds, separate and apart from any and all other funds of said town, city, township, county, drainage, levee, county or school district, so that there shall be no commingling of said funds with any other funds of * * * *. In no case shall the proceeds from the sale of any bonds so sold be used for any other purpose than for the purpose for which said bonds were voted, nor shall the sinking fund or interest collected to meet the interest on said bonds be used for any

other purpose than to meet the principal and interest of said bonds."

Further emphasis to the directions contained in Section 3283, supra, are found in Section 3284, R. S. Mo. 1939, which provides a penalty for violation of any of the sections contained in Section 3283, supra.

Section 3290 of the same chapter provides:

"No money collected nor bonds purchased under the provisions of this article shall be subject to execution, nor liable to be levied upon, taken, sequestered or applied toward paying the debts of such county, city, town, village, township or school district, nor for any other purpose than as is provided for in this article, and the same shall be held and deemed an inviolable sinking fund for the purpose of extinguishing such county, city, town, village, township or school district indebtedness, and for no other purpose: Provided, that any state or United States bonds or money that may be left over after the extinction of all such county, city, town, village, township or school district indebtedness shall be paid into the general revenue fund of such county, city, town, village, township or school district."

In construing the above quoted sections, it is seen that there is a direct and specific statutory prohibition against the transfer, diversion or commingling, of any funds to or for any purpose other than that for which said funds were created. However, Section 3290, supra, does provide for the transfer of funds when the indebtedness for which said funds were raised has been extinguished and there remains, out of said funds, a surplus. Under the facts stated in your letter, apparently, the indebtedness, as to the interest and principal, can be met and fully satisfied with a surplus remaining. But, until such debt is fully satisfied, we believe that Section 3290, supra, does apply.

CONCLUSION

It is, therefore, the opinion of this department that, under the statutes cited supra, and the directions contained therein, the surplus monies, contained in the Fayette Special Road District Sinking Fund, can not be transferred to the general revenue fund until the principal bonded indebtedness and the interest thereon has been extinguished.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:mw

2721
SHERIFF'S FEES: Fees earned by sheriff before July 1, 1946 that do not exceed the statutory limitation of \$5,000 for a period of one year may be retained by him.

FILED

21

September 14, 1946

Mr. Herbert M. Danielson
Clerk of the Circuit Court
Livingston County
Chillicothe, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following facts:

"I am in doubt as to how sheriff's fees should be paid now. Should fees earned prior to July 1, 1946 be paid by separate check so that the sheriff may keep them and those earned after July 1 be turned over to the county or do all fees go to the county regardless of when earned? Fees on many cases are paid long after they are taxed as costs."

The question, as I understand it, is whether or not the sheriff is entitled to fees earned before July 1, 1946, and collected thereafter.

Section 13450, R.S. Mo. 1939, limits the amount of fees a sheriff may retain for any one year, and is as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the first day of January, 1891, every such officer

shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

In the case of J. Fred. Thornton, clerk, v. Emile Thomas, sheriff, 2 Mo. App. 595 (a memorandum of the case is only reported, the full decision is not reported), it is stated:

"1. The clerk of the Circuit Court, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff, who has collected them on fee-bill or execution.

"2. When fees are collected, they will be held by the clerk, to his own use, or paid into the county treasury, according to the determination of the inquiry whether he has retained to his own use from other fees, earned in the same year, the maximum sum allowed him by law for any one year.

"3. The incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county, and the incumbent is not a trustee for the county, and has no power to administer this fund. J. Fred. Thornton, clerk, v. Emile Thomas, sheriff. Opinion by Gantt, P. J."

In a later case, Corbin v. Adair County, 171 Mo. 335, the Supreme Court of Missouri decided a question similar to the one asked in your request for an opinion. In the Corbin case the termination of the office was by separating the office of recorder and circuit clerk, which previously had been administered by one officer. The question being the proper disposition of fees earned before the separation. The present question is similar because it deals with the payment of fees earned by the

sheriff before a different method of compensating him for his services was established. The court, in the Corbin case, said at l.c. 368, 389, 390:

"From April 19, 1898, to December 31, 1898, plaintiff as circuit clerk collected clerk's fees amounting to \$795.31, of which amount he voluntarily paid into the treasury of the county \$461.71, the amount of circuit clerk fees earned by him, but not collected prior to the division of the offices. The remainder, \$333.60, were fees earned and collected by him after the division. During the time from April 19th to December 31, 1898, he was earning enough to pay his salary, but had not collected it. He was of the opinion that he could not appropriate any of his old clerk's fees earned by him prior to the separation, and of his own accord paid what ever of those old fees he collected into the treasury.

"He made out his quarterly statements as required by the Act of 1891 (Laws 1891, page 152), and the county court approved the same, and he paid over the balance. He now seeks by this suit to recover enough to give him his salary of \$1,600. He charges fraud and mistake of fact, but the circuit court found, and his own evidence as well as that of the county judges clearly shows, that there was no mistake of fact. All of his quarterly settlements were correct, and there was no demand on him to turn over the old fees he had earned and collected. No misrepresentation or fraud was practiced on him to induce him to do so. These charges fell to the ground, and the circuit court could not have found otherwise than he did upon the proofs tendered.

"It was further developed that the position in which plaintiff found himself was the result solely of a mistake he made as to the law. His settlements were made with a perfect knowledge of all the facts and are

binding alike on him and the county unless they can be impeached for fraud, collusion or mistake. (State ex rel. v. Ewing, 116 Mo. 129; State ex rel. v. Shipman, 125 Mo. 436; Callaway Co. v. Henderson, 139 Mo. loc. cit. 520; Scott Co. v. Leftwich, 145 Mo. 26.)

"The testimony of plaintiff further discloses that a large amount of fees are due him as circuit clerk, of which at least \$1,200 are collectible and when collected by the sheriff or his successor they will belong to him until he has received the amount of the salary earned by him for the year 1898, not to exceed \$1,600. (Allen v. Cowan, 96 Mo. 193.) So that it is apparent that the plaintiff is not remediless. To the amount of the difference between the fees collected by him which he had earned in 1898 and retained, and the amount earned and not collected for that year, not exceeding \$1,600, he can demand and recover the uncollected fees from his successor, and his own evidence shows they will be more than sufficient. * * * *

The statutory maximum of \$5,000 for one year would as a matter of course limit the retention of fees for the period in 1946 prior to July 1, to an amount not to exceed \$2,500.

Conclusion.

It is therefore the opinion of this department that the sheriff of Livingston County may retain any and all fees earned by him prior to July 1, 1946 which do not exceed the maximum of \$5,000 for the years prior to 1946 and \$2,500 for the period of January 1, 1946 to July 1, 1946. In the event those fees have been collected by the circuit clerk, he should pay them direct to the sheriff entitled thereto. The sheriff must, of course, report these fees to the county in the regular way,

Mr. Herbert E. Danielson

-5-

and in the event they exceed the statutory maximum for the period during which they were earned, he must pay them into the county treasury.

Respectfully submitted,

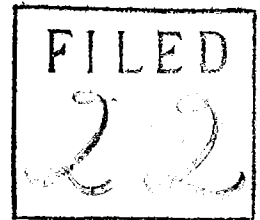
W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

AIRPORTS: The legislative body of a political subdivision which has established an airport may establish a board or body to administer the same.



January 29, 1946

2-14

Mr. Hugh Denney, Director
Missouri State Department of
Resources and Development
State Office Building
Jefferson City, Missouri

Dear Sir:

General Taylor wishes to acknowledge receipt of your request from this department, which reads as follows:

"The Aviation Division of the State Department of Resources and Development has had many inquiries concerning Aviation law. We would like to have an official opinion as to whether or not a local legislative body of a city, including a city under special charter, village, town or county, which has established an airport or landing field, may vest authority for the construction, improvement, equipment, maintenance and operation thereof, in a board or body especially appointed or provided for by such city, village, town or county. In other words can a political sub-division of the State establish under law an Aviation Board, Airport Board or Airport Commission, to administer to the Aviation affairs of a political sub-division of the State."

In that regard, Section 15126, R. S. Mo. 1939, provides:

"The local legislative body of a city, including cities under special charter,

village, town or county which has established an airport or landing field and acquired, leased, or set apart real property for such purpose may construct, improve, equip, maintain, and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance, and operation thereof, in any suitable officer, board or body of such city, village, town or county, or may by franchise or contract authorize others, in whole or in part, to construct, equip, maintain, and operate the same. The expense of such construction, improvement, equipment, maintenance and operation shall be a city, village, town or county charge, in whole or in part, as the case may be. The local legislative body of a city, village, town, or county may adopt regulations and establish fees or charges for the use of such airport or landing field."

There is no restriction in this section as to classes of cities and it will include any political corporation of the state named therein.

Such Aviation Board, Airport Board or Airport Commission as referred to in your letter, may be established under the words "board or body of such city, village, town or county," as provided in Section 15126, R. S. Mo. 1939, supra, for the purposes designated.

Conclusion

It is the opinion of this department that the legislative body of a political subdivision of the state which has established an airport or landing field and acquired, leased, or set apart real property for such purpose, may establish a board or body to administer the construction, improvements,

Mr. Hugh Denney, Director

-3-

equipment, maintenance and operation thereof.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

MUNICIPAL CORPORATIONS: Discussion of rights of foreign municipal corporations to acquire real property for airport purposes in Missouri and incidental matters relative thereto.

April 26, 1946



3/
24

Mr. Hugh Denney, Director
Missouri State Department of
Resources and Development
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office, and reading as follows:

"Supplementing our request of September 18 regarding the legality of a Missouri city purchasing land in Illinois for airport purposes, we now have need for an opinion on the legality of a city outside of Missouri acquiring land in this state for airport purposes. I would, therefore, appreciate an opinion on the following questions:

- "1. Is it legal for a municipality outside the State of Missouri to own airport property in Missouri?
- "2. Will this property be tax exempt?
- "3. Can the municipality desiring to buy airport property in Missouri use the condemnation laws of Missouri to acquire such property?
- "4. Will the present zoning restrictions or future zoning restrictions apply to said airport property?
- "5. Can the municipality owning airport property in Missouri levy a fuel tax for the maintenance and upkeep, development, and improvement of the airport property?"

I.

Consideration of the authority of a municipal corporation to acquire and hold real property for airport purposes outside the corporate limits of such municipal corporation must necessarily be guided by the constitutional and statutory provisions of each state relative thereto. However, the general rule, as stated in McQuillin on Municipal Corporations, 2nd Ed., Sec. 1210, appears to be:

"Notwithstanding earlier rulings to the contrary, including dicta, * * * it is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits, for legitimate municipal purposes, * * *."

This is the rule in Missouri, as appears from the opinion of the Missouri Supreme Court in *Hafner v. City of St. Louis*, 161 Mo. 34, wherein the court said:

" * * * In our opinion the mere directory power of the charter, as to the right of the city to purchase, hold and receive real estate, outside of the corporate limits of the city, for particular designated purposes, should not be construed as an absolute limitation upon the general power conferred upon the city under section one of the statute concerning corporations above cited, to purchase and hold real estate wherever located, when it becomes necessary for the purposes of the corporation. The necessities of the city, under the statute, constitute ample warrant for the purchase of land wherever located, for other purposes than those designated in its charter. * * * "

(Emphasis ours.)

Assuming, but not determining, that the constitutional and statutory provisions relating to the power of acquisition of real property by municipal corporations in the states adjoining Missouri are in accord with the majority rule as expressed in the quotation from McQuillin on Municipal Corpora-

tions, cited supra, we next are confronted with the question of whether or not there exists in either the Constitution or statutes of the State of Missouri any provision to prohibit such acquisition of real property in this state.

It is well settled that the State of Missouri has the power to refuse any foreign corporation, whether municipal or private, the right to acquire and hold real property within the territorial limits of this state, and if such prohibition has been declared to be the public policy of this state by virtue of constitutional or statutory provisions declaratory of such public policy, then, without regard to the authority of the foreign municipal corporation to acquire real property herein, such power could not be exercised.

In the case of *Langdon v. City of Walla Walla*, 193 Pac. 1, the Supreme Court of Washington had for consideration the legality of the issuance of certain city bonds, the proceeds of which were to be used for the construction and maintenance of a water supply system for the City of Walla Walla, but which entailed the acquisition of real property outside the State of Washington and in the State of Oregon. The contention was made that the City of Walla Walla had no authority to acquire real property outside its own corporate limits, and further that even if it had such power which it might exercise within the territorial limits of the State of Washington, such power did not extend to the acquisition of real property located outside the State of Washington and inside the State of Oregon. After upholding the right of the City to acquire real property beyond its corporate limits, the court said with respect to the second contention:

"The state of Oregon may, of course, if it so choose, withhold from the cities of this state the right to acquire property in that state, just as it may withhold such right from any other foreign corporation, but that does not argue that this state has not given to its cities such power of acquisition and ownership of property as will enable them to acquire property in Oregon by consent of that state. * * * We conclude, then, that the city of Walla Walla does possess in its proprietary capacity the power to acquire and own in the state of Oregon, so far as it may be necessary for it to acquire such power from the state of Washington. Whether or not and to what extent the city may be able to exer-

cise such power in the state of Oregon is, of course, a question to be decided under the laws and Constitution of that state.
* * * "

We have not found any express prohibition in either the Constitution or laws of the State of Missouri as would prohibit a foreign municipal corporation from acquiring and holding airport property in this state. At first blush, it might be thought that Section 5 of Article XI of the Constitution of 1945 might have that effect. We quote, in part, from the constitutional provision mentioned:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business;
* * * "

It seems to be the declared public policy of the State of Missouri that the acquisition and holding of real property by municipalities for the operation thereon of airport facilities is a part of the legitimate business of such corporations. This has been a subject of legislative consideration and as a result thereof the General Assembly has enacted several statutes relative thereto. We direct your attention particularly to Section 15122, R. S. Mo. 1939, reading as follows:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

As a matter of fact, the Legislature has declared that such real property so owned and held is real property taken and used for "public use" by its specific declaration to that effect in Section 15124, R. S. Mo. 1939, reading as follows:

"Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 hereof shall and are hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Viewed in the light of the foregoing, we conclude that no prohibition exists under the Constitution or statutes of the State of Missouri against the acquisition of real property for airport facilities in this state by a foreign municipal corporation, if the power to so acquire and hold real property for that purpose is conferred upon such foreign municipal corporation by the Constitution and statutes of the state of its incorporation.

One further question might present itself as corollary to the above discussion, namely, whether or not such foreign municipal corporation would be required to comply with the laws of the State of Missouri regulatory of foreign corporations doing business in this state. We have examined "The General and Business Corporation Act of Missouri," found in Laws of 1943, pages 410-491, inclusive, and have come to the conclusion that such foreign municipal corporations would not be required to register and obtain a license. We direct your attention to Section 96 of the Corporation Act, which reads, in part, as follows:

"A foreign corporation organized for profit, before it transacts business in this State, shall procure a certificate of authority so to do from the Secretary of State. * * *"
(Emphasis ours.)

Inasmuch as the foreign municipal corporation necessarily would not be "organized for profit," we have reached the conclusion stated.

II.

With respect to the question as to whether or not such real property will be exempt from taxation under the laws of Missouri, we direct your attention to Section 6 of Article X of the Constitution of 1945, reading as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

"Political subdivisions," as used in the first clause of the above quoted constitutional provision, must necessarily refer to political subdivisions incorporated or formed under the Constitution or laws of the State of Missouri, and therefore the exemption afforded therein to property owned by political subdivisions of the State of Missouri could not be extended to real property owned by a foreign municipal corporation. We believe this to be particularly true in view of the fact that the real property held in this state by such municipal corporation is held or owned by the corporation in its proprietary rather than its governmental capacity. That such is the nature of the holding of such real property in this state by a foreign municipal corporation appears from the opinion of the Supreme Court of Washington in the case of *Langdon v. City of Walla Walla*, cited supra, wherein that court said:

"The suggestion that, to allow a city of this state to acquire property of the nature here in question in another state would, in effect, be an assumption of extra-territorial jurisdiction, we think is wholly without force, in view of the fact that the city's ownership of such property situated outside its own territorial limits, whether within or without this state, is only the ownership and control over such property in the city's proprietary capacity. * * *"

(Emphasis ours.)

A quite similar situation was presented in *State ex rel. Taggart, et al. v. Holcomb, et al.*, 85 Kan. 178, 116 P. 251, 50 L.R.A., N.S., 243, Ann. Cas. 1912D, 800 (writ of error denied *Kansas City v. State ex rel. Taggart*, 226 U. S. 599, 33 S. Ct. 112, 57 L. Ed. 375), wherein the court said:

"And so it may be said here that, when a city of the state of Missouri comes into Kansas, it comes as a private party and brings with it none of the prerogatives of sovereignty. The general rule is that all property, not expressly exempted, is taxable, and the fact that the state does not tax itself and its municipalities to obtain revenue for itself is no reason why a foreign municipality, who is here in the capacity of a private proprietor, and whose property receives protection from the state, should contribute nothing towards that protection or should escape paying the taxes imposed upon other owners of property. It is clear that the exemptions from taxation, provided for the state and for cities and municipalities of the state, are only declaratory of the immunity that would be granted on fundamental principles of government, and that the cities and municipalities referred to in the statute and Constitution are those of our own state.

"The fact that municipalities of another state, which becomes proprietors in Kansas, are not accorded exemption from taxation, is no basis for the claim that the interpleader is denied the equal protection of the laws or deprived of property without due process of law in violation of the federal Constitution." (Emphasis ours.)

We, therefore, conclude that such property would not be exempt from taxation imposed under the laws of the State of Missouri.

III.

The question of the authority of a municipal corporation to acquire by condemnation real property to be used for an airport in the State of Missouri is one which we think would be largely controlled by the principle of law set forth in the case of *County Court of Wayne County v. Louisa & Fort Gay Bridge Co., Inc.*, 46 F. Supp. 1. In that action the State of West Virginia was seeking to condemn a toll bridge for public purposes, located partly in West Virginia and partly in Kentucky, in the absence of any permission or agreement with the State of Kentucky or the owner of such bridge, and in the

absence of any special authorization of Congress. We quote from the opinion in the case:

"Plaintiff claims that it is authorized by the State of West Virginia to condemn the whole of this bridge by virtue of Chapter 27, of the Acts of West Virginia, Second Extraordinary Session, 1933, W. Va. Code, Ch. 17, Art. 17, Secs. 30-32. It claims that under the doctrine of comity between the several states, that it may exercise the right of eminent domain upon property located in Kentucky, provided no law of Kentucky forbids such condemnation, and provided it is ready and willing to pay to the owners of that private bridge the just compensation for the property taken. I see no merit in either of these contentions.

"The power of eminent domain is an attribute of sovereignty. Within its own jurisdiction each state possesses such sovereign power. But no state can take or authorize the taking of property located in another state. Each state holds all the property within its territorial limits free from the eminent domain of all other states. To argue that the people of West Virginia have any inherent right to take property located in Kentucky from a citizen of that state, is to assert that the sovereignty of West Virginia extends to some extent over the soil of Kentucky. 'To state the proposition is to refute it.' *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489, 498, 14 L.R.A., N.S., 207, 118 Am. St. Rep. 754, 10 Ann. Cas. 116; 18 Am. Jur. 645, 29 C.J.S., Eminent Domain, Sec. 19, p. 805; *Grover Irrigation & Land Co. v. Lovella Ditch, etc., Co.*, 21 Wyo. 204, 131 P. 45, L.R.A. 1913C, 1275, Ann. Cas. 1913D, 1207. A state cannot own or acquire property in another state without its consent. *Dodge v. Briggs, U.C.*, 27 F. 160; *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796; *Klein v. City of Louisville*, 224 Ky. 624, 6 S. W. 2d 1104, 1108. * * *

" * * * No such authority has been given by Congress for the condemnation of the Louisa

and Fort Gay bridge, and neither the State of Kentucky nor the owner of the bridge has consented thereto. Comity between these adjoining states cannot supply that high and drastic power of condemnation. Comity is a courtesy which one state extends to another by enforcing the laws of such other state when it is proper to do so, and such law is not contrary to the public policy of the state. Comity will not be exercised, when to do so, the state would be violating its own laws, or inflicting injuries on some one or more of its citizens."

We are unable to discover any constitutional or statutory authorization which would grant to a foreign municipal corporation the right to invoke the powers of eminent domain to acquire such property, and in the absence of such consent having been granted, we conclude that such foreign municipal corporation could not avail itself of the condemnation laws of the State of Missouri.

IV.

With respect to your question relating to zoning restrictions with reference to airports owned in the State of Missouri by foreign municipal corporations, we believe that there can be no question but that such restrictions must apply. It has been held that **sovereign states** possess jurisdiction to control the air space above their territories as being essential to the safety of their inhabitants. It has also been held that any use of the air space over land which is injurious to the land or impairs or interferes with the possession or enjoyment thereof is unlawful. See *Smith v. New England Aircraft Co.*, 170 N. E. 385, 270 Mass. 511, 69 A.L.R. 300; also *Guith v. Consumers Power Co.*, 36 F. Supp. 21.

With these principles in mind, it becomes apparent that zoning regulations and restrictions are a proper exercise of the sovereign power of the State of Missouri, and all airports operated within the territorial limits of the state will necessarily be subjected to such regulations and restrictions.

V.

Your fifth query is somewhat indefinite as to whether it is intended to levy the fuel tax, mentioned therein, upon sales made on the real property owned by the foreign municipal corpo-

ration in the State of Missouri, or whether such tax is to be levied within the territory of the foreign municipal corporation within its own corporate limits in the state of its creation.

As has been pointed out previously in this opinion, the acquisition and holding of the real property by the foreign municipal corporation in this state is and will be in its proprietary capacity, and not in its governmental capacity. Such being the case, the taxing power of the foreign municipal corporation cannot extend to territory located within the State of Missouri. It is elementary that the authority to impose taxes by any governmental body is restricted to the area over which it exercises governmental control. In view of the great diversity of laws and Constitutions of states adjoining the State of Missouri, which would necessarily control the authority of any particular foreign municipal corporation to levy any particular tax, we deem it inadvisable to attempt in this opinion to cover that phase of your inquiry completely.

CONCLUSION

In the premises, we are of the conclusion:

(1) That no constitutional or statutory prohibitions exist in the State of Missouri which would preclude the acquisition and holding of real property in this state by a foreign municipal corporation for airport purposes.

(2) That such real property, when so acquired and held, will not be exempt from taxation under the laws of the State of Missouri.

(3) That the right of eminent domain may not be exercised by a foreign municipal corporation in acquiring such property in the State of Missouri, under present constitutional and statutory provisions.

(4) That existing and future zoning restrictions and regulations of the State of Missouri will be applicable to such property.

Mr. Hugh Denny - 11

(5) That such foreign municipal corporation may not levy any taxes within the State of Missouri.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

COUNTY PLANNING AND ZONING:

Authority of Missouri State Department of Resources and Development relative to master plans adopted by counties of the first class.

July 1, 1946



Mr. Hugh Denney, Director
Missouri State Department of
Resources and Development
Jefferson City, Missouri

Dear Sir:

Reference is made to your request of recent date for an official opinion of this office, reading as follows:

"On June 8, 1946, the Department of Resources and Development received from the St. Louis County Planning Commission a brochure including three master plans as follows:

"1) Comprehensive Parks and Parkways Plan, 2) Comprehensive Airport Plan, and 3) Setback Zoning Plan.

"With this material came a request for immediate action by our Department in approving such plans.

"According to the statutes of 1941, Section 15351b, the State Planning Board (whose duties are now a part of the State Department of Resources and Development), the Commissioner of Health, and Chief Engineer of the State Highway Department must approve the master plans of the County Planning Commission. Therefore, in conformity of the request of the St. Louis County Planning Commission, we began an investigation of our own to determine the adequacy of the county plans in relationship to state aviation, parks and parkways, and industrial development plans. During the course of our investigation, we were told by the St. Louis County Planning Commission that by virtue of H. B. 885, present session of the legislature, that they no longer needed our approval for

their plans. However, H. B. 885, according to the title of the act, applies only to pages 481 to 489 of the Laws of Missouri 1941, whereas Section 15351b is found on page 470 of the Laws of Missouri, 1941.

"I have not been able to determine whether or not Section 15351b has been repealed or modified by any other act, either in 1943 session or the present session. Information from the Legislative Research office indicates that no changes have been made in 15315b by the present legislature.

"In order that we may not be derelict in our duties by failing to act within the 45 days time period granted in Section 15351b and also to prevent our being presumptuous in making objections to any part of the St. Louis County Planning Commission's report, if our legal authority has been repealed, we solicit your prompt attention to this matter and ask that a copy of your opinion be sent to Mr. G. R. Imboden, Secretary, St. Louis County Planning Commission, Court House, Clayton, Missouri."

Section 15351b, referred to in your letter, is found in Laws of Missouri, 1941, at page 470. It forms a part of twenty sections relating to county planning and zoning, appearing in Laws of 1941, pages 465 to 480, inclusive. The pertinent part of Section 15351b reads as follows:

"No official master plan or zoning plan or portion thereof, or temporary or emergency master or zoning plan or portion thereof, no final, temporary or emergency sets of regulations and restrictions governing subdivisions of land or regarding building or setback lines on major highways or relating to lots, lands, and buildings, or structures, or no other final, temporary or emergency planning or zoning regulations or restrictions provided for in this article shall be adopted, ordered, amended or extended by the county planning commission or the county court, as the case may be, without the prior approval of the state planning board, the commissioner of health and the chief engineer of the state highway commission; * * * "

It will be noted that under the above quoted provisions of this section, approval is to be granted by the State Planning Board. Under the provisions of an act found in Laws of 1943, pages 978 to 984, inclusive, particularly Section 8b thereof, the duties previously discharged by the State Planning Board were transferred to the State Commission of Resources and Development. Said Section 8b reads, in part, as follows:

"All of the powers and duties heretofore vested in and exercised by the State Planning Board are hereby vested in and shall be exercised by the State Commission of Resources and Development. * * * "

House Bill No. 885, adopted by the 63rd General Assembly, and effective on June 10, 1946, relates to the adoption of a master county plan in all counties of the first class. The provisions of the bill at no place require the approval of the State Department of Resources and Development prior to the adoption of a master county plan. It thereupon becomes pertinent to determine whether or not the provisions of Section 15351b, quoted supra, which do require such approval, are yet in effect.

It is provided by Section 2 of the Schedule appended to the Constitution of 1945, as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Reference to the Constitution of 1945, particularly Article VI, Section 8, discloses the following provision relating to certain requirements applicable to laws affecting the internal organization and powers of counties:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class

shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

The term "power" has acquired, in legal phraseology, a well defined meaning. As used with reference to officials or organizations, it has been defined in the following language:

"'Power' means the right, ability or faculty of doing something. It is an ability to act regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance." 33 Words and Phrases, Perm. Ed., p. 141.

"'Power' is synonymous with authority or right." 33 Words and Phrases, Perm. Ed., p. 140.

The constitutional provision quoted supra, in the light of the definition of the term "power" set forth, clearly indicates that with respect to the authority of counties falling within the same class, such authority must be uniform.

Adverting to Section 15348 of the act found in Laws of 1941, pages 465 to 480, inclusive, of which Section 15351b forms a part, we find that such act is by its terms made applicable to "any county in which, or in a county immediately adjoining which, there is now or may hereafter be located and constructed any permanent camp, cantonment, post, fort or training area of the United States Army, or any ordnance or ammunition plant or factory owned and operated by the United States or owned by the United States and operated under contract with the United States, except any county which now contains or may hereafter contain a population of not less than four hundred thousand (400,000) nor more than six hundred thousand (600,000) inhabitants." * * *

The classification of counties in accordance with the provisions of Article VI, Section 8, quoted supra, has been made by the 63rd General Assembly under the provisions of House Bill No. 476, which reads, in part, as follows:

"Class 1. All counties now having, or which may hereafter have an assessed valuation of

three hundred million dollars (\$300,000,000)
and over shall be in the first class."

It is further provided by Section 2 of the same bill that "assessed valuation," as used in the act, shall mean the valuation of all real and personal property as determined and finally established by the state agency charged with the duty of equalizing assessments.

It is further provided by Section 3 of the act that, for the purpose of determining the initial class of the various counties, the assessed valuations of such counties as found in the "Journal of the Board of Equalization of the State of Missouri for the year ending December 31, 1944" shall be used.

Reference to the "Journal" discloses that two counties fall within the first class, namely, Jackson, with an assessed valuation of \$646,496,280, and St. Louis, with an assessed valuation of \$357,704,350. Therefore, if the act found in Laws of Missouri, 1941, pages 465 to 480, inclusive, is by its terms applicable to both of the counties constituting the first class, it is consistent with the Constitution of 1945 and, in accordance with Section 2 of the Schedule appended thereto, yet remains in full force and effect.

However, we have reached the conclusion that the act is not uniform in its application to all counties of the first class. The reason therefor is the incorporation in Section 15348, quoted supra, of a clause excepting from the provisions of the act any county which contains a population of not less than 400,000 nor more than 600,000 inhabitants. Reference to the census of 1940 discloses that in that year Jackson County contained 477,828 inhabitants, and that St. Louis County contained 274,230 inhabitants. It is therefrom apparent that the act is not uniform in its application to all counties constituting the first class, and is, therefore, inconsistent with the provisions of the Constitution of 1945. Under the provisions of Section 2 of the Schedule appended to the Constitution of 1945, said act, which includes Section 15351b, is no longer effective.

CONCLUSION

In the premises, we are of the opinion that a master plan may be adopted by a county of the first class without requiring

Mr. Hugh Denney - 6

the approval of the Missouri State Department of Resources
and Development.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

MEMORIAL AIRPORTS: One municipality only may establish a memorial airport under House Bill #192. Two or more municipalities cannot combine for such purpose. An appraisal or valuation of real estate previously acquired cannot be used by a municipality as a basis for appropriated funds for matching the \$10,000

December 9, 1946 State aid. The Governor and the Missouri State Division of Resources and Development would have the right to follow matching State funds for memorial airports to see that they are lawfully expended.

Missouri State Division of
Resources and Development
State Office Building
Jefferson City, Missouri

Attention: Honorable Hugh Denney

Gentlemen:

This will acknowledge your recent request to this Department directed to the attention of Mr. Will F. Berry, Jr., requesting an opinion concerning the procedure to establish local airports under the terms of C.S. for House Bill #192. Since your letter came to Mr. Berry the attention of this Department to the legal matters of the Missouri State Division of Resources and Development has been assigned to the writer.

The contents of your letter follow:

"In connection with the approval of memorial airports for state aid under Senate Committee Substitute for House Bill 192, the question has arisen as to whether or not a city and a county, or two or more cities may combine for purposes of complying with the Memorial Airport Act. I would like to have your opinion:

"1. As to the legality of these political subdivisions of government combining to the extent of \$10,000 on a single project approved by the Division of Resources and Development as a desirable airport project for the two or more political subdivisions.

"2. The legality of two or more political subdivisions combining to

12/17
FILED

22

Missouri State Division
of Resources and Development -2-

the extent of \$10,000 each of state matching funds on a single project approved by the Division of Resources and Development as a desirable airport project for the two or more political subdivisions.

"Further, I would like to have your opinion as to the legality of allowing an appraised value of real estate previously acquired by a political subdivision as the basis for local funds for matching the \$10,000 state aid. A number of Missouri communities, such as Maryville, Eldon, Bolivar, Carthage, and Columbia, have expended considerably more than \$10,000 of local funds in acquiring lands and starting an airport project. It would be unfortunate, indeed, if these progressive communities were to be denied the benefits of this Act and less progressive communities get all the benefits.

"Also, I would like to have your opinion as to whom is responsible for the verification of the expenditure of state funds for the approved projects. As I understand it, the funds have been made available to the Governor's Office for release upon the approval of this Division. Does that mean that responsibility for following up on the project to determine the proper expenditure of state funds falls upon the Governor's Office, the Budget Director, or whom?"

Your request for the opinion is divided into four different subjects which appear on the face of the letter to be as follows:

1) Whether the political subdivisions or municipal corporations mentioned in said House Bill #192 must proceed singly or whether they may combine into two or more enterprises, and proceed jointly in order to obtain the financial benefits prescribed in said House Bill #192.

2) Whether two or more political subdivisions combining, if they should combine, and appropriate \$10,000.

Missouri State Division
Of Resources and Development -3-

each of their own funds on a single project for the purchase and operation of an airport would be entitled to have allocated to them jointly, matching funds from the State equal to the appropriation of each one as a single unit.

3) Whether it would be lawful to use the appraised value of real estate previously acquired by a municipality as a basis for securing the matching funds from the State.

4) Upon whom the responsibility rests for the verification of the expenditure of State funds for approved projects under said House Bill #192, whether the Governor's office, the Budget Director, or whom?

Committee Substitute for House Bill #192 is as follows:

"AN ACT

"To provide airfields as memorials to those who died while serving in the Armed Forces of the United States in the war against Germany, Japan and their allies; to promote the advancement of aviation; to authorize Municipal Assemblies and County Courts to appropriate funds therefor; to provide that the State of Missouri shall grant an equal amount not exceeding ten thousand dollars (\$10,000.00) to such city, town or county; to authorize cities, towns or counties to accept State, Federal or other funds; to provide free technical advice from the Department of Resources and Development; to provide for the approval of the Department of Resources and Development.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. In appreciation of the services of our gallant Armed Forces

Missouri State Division
of Resources and Development -4-

and to perpetuate the memory of their heroic achievements in the war against Germany, Japan and their Allies and to promote the advancement of aviation in the name of those who gave their lives as members of our gallant Armed Forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate air fields in such counties or near such cities and towns and to receive free technical advice from the Department of Resources and Development. Provided further that when any city, town or county in Missouri shall certify to the Governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such air fields a like sum not exceeding ten thousand dollars (\$10,000.00) shall be allotted to said city, town or county from the appropriation hereinafter made for such purpose but said sum shall be released to such city, town or county only after the Department of Resources and Development has certified to the Governor that in their judgment the air field in question is desirable and in the interest of the development of aviation and that the funds proposed are adequate to complete the project; and provided further that cities, towns or counties are hereby authorized to receive Federal grants in addition to all other grants or funds made available for such purpose under this act."

The first two queries you submit in paragraphs one and two are so closely interwoven in the matter of whether a political subdivision shall proceed singly in the premises or may join with one or more other political subdivisions in proceeding under said House Bill #192 that we believe it will be intelligible and clear to answer them both in one reply as if there were only one question.

Missouri State Division
of Resources and Development -5-

We observe in the beginning that the title to the Bill as well as the subject matter of the Bill uses the disjunctive "or" in describing the several municipal subdivisions entitled to purchase, establish and maintain such airports. The language of the Bill and the punctuation indicate very clearly, we think, that the intention of the Legislature was that any one of the municipalities named in the title and in the body of the Bill may proceed to appropriate funds and receive matching sums from the State, purchase sites, construct and operate air fields, but there is no word in any part of the Bill that would justify the idea that the Legislature intended that two or more of such municipalities could combine to carry out any such project.

The word "or" may only be converted into the conjunctive "and" when it is strictly and absolutely necessary to arrive at the intention of the Legislature. 46 C.J. page 1127, states that rule as follows:

"When used to connect a series of words in the permission or the prohibition of a given act, 'or' may be construed to mean 'and' when necessary to make the statute express the true legislative intent, but only when so necessary; * * *".

The Supreme Court of this State had before it many years ago, the case of Drainage District vs. Bates County, 216 S.W. 949. That was a case where there was a controversy over the question of whether the statute relating to drainage districts required all lands or public roads to be included in a drainage district, and subject to assessment, and whether the drainage ditch in the district had to be sufficient to drain all the lots, lands, public and corporate roads and railroads, or whether it had to be sufficient only to drain any lands, or any roads, public or corporate, or any railroads, if necessary. The Court held that the statute was in the disjunctive and meant any lands that might require drainage through any ditch might be brought into the district and become subject to assessment for benefits. The Court on the point, l.c. 953, said:

"Nor do we agree with respondent's contention that no land or public

roads can be included in the drainage district and subjected to assessment or apportionment for benefits, unless it is necessary to drain such lands or roads.

"This district was formed upon the petition of one or more landowners to the county court under article 4 of chapter 41, R.S. 1909, relating to drains and levees. Section 5578 provides:

- "The county court * * * shall have power, * * * when the same shall be conducive to the public health, convenience or welfare, or where the same will be of public utility or benefit, to cause to be constructed * * * any ditch * * * within said county, when the same is necessary to drain any lots, lands, public or corporate roads, or railroads."

"This does not require that the ditch must be necessary to drain all the lots, lands, public and corporate roads and railroads. It is sufficient if it is necessary to drain any lands, or any roads, public or corporate, or any railroads. The law has put the different kinds of property in the district, which it may be necessary to drain, asunder in the disjunctive, and we are not authorized to join them together in the conjunctive.* * *".

There is no line or word in said House Bill #192, as we view it, authorizing two or more municipalities, each procuring and appropriating a separate \$10,000, then add such separate sums together making \$20,000 or more perhaps, according to the number so joining, and then procure a matching sum from the State. While House Bill #192 itself is more or less obscure in the method of procedure to accomplish the objective of the Bill we think we have ample authority in the new Constitution to clarify the proposition.

Section 27, Article VI of the new Constitution of 1945, is as follows:

"Sec. 27. Revenue Bonds for Municipally Owned Utilities.-- Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality from the operation of such utility."

It will be noted that said Section 27, supra, uses the words "to be owned exclusively by the municipality". We believe the Legislature had said Section 27 in mind in passing said Bill, and intended only that any one of the municipalities mentioned in said House Bill #192 could proceed to procure its funds and ask for matching funds from the State to purchase, establish and maintain airports, and that it was not the intention of the Legislature to allow two or more of such municipalities to combine for such purposes.

That inevitably brings up the question of the title to the real estate purchased or condemned under the right of eminent domain. When the framers of the Constitution included in said Section 27 of said Article VI the words "to be owned exclusively by the municipality" it was forever put out of the power of the Legislature to allow more than one municipality to exercise a joint sovereignty over such real estate. This, for the reason that in most, if not all, cases it will be necessary for any municipality, proceeding under said House Bill #192, to vote bonds to obtain funds for the purchase of real estate for an airport. The question of levying taxes for the payment of the bonds and interest would be one of constant confusion, dispute and possible litigation if two municipalities were involved. Therefore, the framers of the Constitution made it absolute that the

Missouri State Division
of Resources and Development -8-

title to such real estate should vest in only one municipality.

We believe this will answer your questions in paragraphs one and two of your letter.

Answering question three, whether a former appraisal may be used in the process of the purchase of real estate for the purpose of a memorial airport, we assume that by the employment of the following language in paragraph 4 (unnumbered) which is as follows:

"Further, I would like to have your opinion as to the legality of allowing an appraised value of real estate previously acquired by a political subdivision as the basis for local funds for matching the \$10,000 state aid. A number of Missouri communities, such as Maryville, Eldon, Bolivar, Carthage, and Columbia, have expended considerably more than \$10,000 of local funds in acquiring lands and starting an airport project. It would be unfortunate, indeed, if these progressive communities were to be denied the benefits of this Act and less progressive communities get all the benefits."

you mean municipalities which have already acquired lands for memorial airports. House Bill #192 would, we think, scarcely permit any other construction of the effect of the Bill on your part.

If, as we take it you do refer to past acquisition of such lands, it is our belief that the value of such land, whatever may have been paid for them is not to be taken as the appraised, or actual value, to obtain the matching sum from the State provided for in said House Bill #192. We think it quite plain that the language of said Bill, and the intention of the Legislature in employing it, look only to the future as prospective enterprises in the establishment of memorial airports by municipalities.

A well established rule of construction is that a statute must be held to operate prospectively only, unless

Missouri State Division
of Resources and Development -9-

the intent of the Legislature is clearly expressed in the language of a statute, that it shall act introspectively, or that the language of the statute admits of no other construction by the Courts.

The Supreme Court of Missouri in one of many other like decisions by it, in the case of Lucas vs. Murphy, et al., 156 S.W. (2d) 686, l.c. 690, in announcing this rule said:

"* * * Regardless of the type of legislation under consideration, 'In the construction of statutes the uniform rule is that they must be held to operate prospectively only, unless the intent is clearly expressed that they shall act retrospectively, or the language of the statute admits of no other construction.' * * *".

The Legislature in the expression of its intention in said House Bill undoubtedly had in mind Section 13 of Article I of the Constitution of this State of 1945, which is as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

Keeping the above quoted Section of our Constitution in mind, and observing again the full terms of said House Bill #192, we see that the terms and effect of said Bill are prospective. We believe that, under such authorities, and the proper rule of construction of the terms of said paragraph (unnumbered) 4, it would not be lawful to allow an appraised value of real estate previously acquired by a political subdivision as the basis for local funds for matching the \$10,000 each of State aid. We may conceive, however, that if real estate has been acquired and a memorial airport constructed by a municipality in the past, and the municipality involved would desire to expand and broaden its facilities as an airport, and would thence appropriate an additional sum of \$10,000 for such expansion,

Missouri State Division
of Resources and Development -10-

and additional construction, then it would come within the prospective terms of said House Bill #192. The idea of "construction" of an airport might be germane to "additional construction" in the terms of said Bill as well as to refer to the future initial construction of such airport.

Sections 26(b) and 26(c) of Article VI of the present Constitution are as follows:

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

"Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)."

Said House Bill #192 itself includes counties in the naming of municipalities which may acquire memorial airports. Therefore, counties would come within the terms of said Section 27, Article VI, supra, of our present Constitution.

The succeeding procedure looking to the final establishment of a memorial airport would be governed by the statutes of this State in regard to a municipality voting for the creation of a debt and the issuance of bonds in payment therefor. This would include the passing of legislation by ordinance by the legislative body of any city, town or village. Such ordinances should, under proper legal guidance, provide for the safe and proper expenditure

Missouri State Division
of Resources and Development -11-

of the sums derived from the creation of an indebtedness for a memorial airport, including the appointment of committees, the requiring of reports and auditing of the expenditure of public monies, both appropriated and matching sums derived from the State, in any such project, Such necessary ordinance or ordinances should, and no doubt would, be required to be passed and approved in conformity to all laws pertaining thereto, under the direction, observation and approval of prospective purchasers of bonds to be issued in payment of any indebtedness created by such municipality.

None of such steps as are necessary to be taken in such proceedings are provided in said House Bill #192. This Bill provides only for the acquisition and operation of such memorial airports. The proceedings to acquire title to such real estate as may be needed, its appraisal and the payment therefor, have been as best we may, indicated hereinabove. We are not able to anticipate and outline, perhaps, all of the necessary steps and measures to be taken in any case under said House Bill #192. Most of such steps would have to be taken and be guided by the statutes of this State, and ordinances of any city, town or village involved.

We believe this will answer your query number 3.

Proceeding now to the fourth and last question you submit as to whom is responsible for the verification of the use of the funds for such airport projects, and whether the Governor's office, the Budget Director, or your Department shall exercise such responsibility and follow the project to its conclusion to determine if the funds supplied have been properly spent, we find that in Section 22, Article IV of the new Constitution, under the title of "Revenue", the last two sentences of said Section are as follow:

"* ** The division of the budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. The comptroller shall be director of the budget, and shall pre-approve all claims and accounts and

Missouri State Division
of Resources and Development -12-

certify them to the state auditor for payment."

Apparently, that part of said Section 22 of Article IV of the new Constitution requires the pre-approval of claims and accounts against the State by the Budget Director. Here, however, we have the matter of an appropriation for a definite purpose as is provided for in said House Bill #192. It is not an account, neither is it a claim against the State. House Bill #192 is silent upon this question also. But we are of the belief that the Budget Director has no further duty to perform in such matters after the matching sum has been appropriated and placed in the hands of the Governor to be used for an airport project to be released upon the approval of the Division of the Missouri State Division of Resources and Development. It would appear, however, that the Governor's Office and the Missouri State Division of Resources and Development would have the right, and would be charged with the duty of performing it, to exercise a correlative check upon the disposition of the matching funds supplied by the State for any airport project. This, we believe, could be accomplished by requiring certified copies of ordinances and steps taken to purchase, or condemn by eminent domain, real estate for such purposes, copies of appraisalment of such real estate, vouchers for all sums paid out, and in fact, a complete abstract of all proceedings from the beginning to the end of any such project.

No doubt the ordinances passed by a municipality would cover these propositions so that it should not be a very difficult matter for the Governor's office and the Missouri State Division of Resources and Development to keep a complete check on the proceedings, expenditures, and outcome of such projects.

CONCLUSION

It is, therefore, the opinion of this Department considering the foregoing, that:

- 1) A separate and single municipality only may proceed to appropriate funds to establish a memorial

Missouri State Division
of Resources and Development -13-

airport, under C.S.H.B. #192, and receive a matching sum from the State.

2) Two or more municipalities may not combine to establish a single airport.

3) That the terms of said House Bill #192 are prospective and not retrospective. That an appraised value of real estate previously acquired by a political subdivision of this State as a basis for local funds for matching the \$10,000 State aid may not be used.

4) That the Budget Director would not have any duty to perform after the matching sum provided for in said House Bill #192 has been made available to the Governor's office for release upon the approval of the Missouri State Division of Resources and Development. However, the Governor and the Missouri State Division of Resources and Development, we think, would have the lawful right to follow such funds and require proof by means of vouchers and other data showing that such funds have been properly expended.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CWC:lr

ASSESSORS: Receive an annual compensation from June 1st of one year to May 31st of next year.

FILED

22

December 16, 1946

Mr. Ed. DeField
Assessor
Mississippi County
Charleston, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department, reading as follows:

"Affecting the compensation of the Assessors Office a question has arisen which I would appreciate your giving some information on.

"The question is: For what, does the Assessor receive compensation? By this I would like to know if the Assessors are compensated for their duties which they perform from January 1st. to May 31st. of each year or is it for their duties performed from January 1st. to December 31 of each Calendar Year."

House Bill 891 of the 63rd General Assembly, which provides for the compensation of county assessors in counties of the third class, reads as follows:

"Section 1. The compensation of the county assessor in counties of the third class shall be 45 cents per list, and each county assessor shall be allowed a fee of 6 cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed

to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the third class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list.

"Section 2. The county assessor in counties of the third class shall receive \$5.00 per day for each day he shall serve as a member of the county board of equalization.

"Section 3. The county assessor in counties of the third class shall receive as compensation for his services in taking merchants' tax statements and entering them in the tax book as required by Section 11309, the sum of 25 cents for each statement.

"Section 4. The county assessor in counties of the third class shall receive 10 cents for each individual statistical list of land acreage and other accompanying agricultural statistics filed by him with the state department of agriculture as required in Section 14030.

"Section 5. The county assessor in counties of the third class shall be allowed, for attending the annual assessors' meeting called by the state tax commission, as provided in sub-section 14 of Section 15 of an Act of the 63rd General Assembly known as House Bill No. 528, approved December 19, 1945, the sum of \$5.00 per

diem for the time actually and necessarily spent, including going to and returning from such meeting, and shall be reimbursed for transportation expense actually and necessarily incurred in going to and returning from said annual meeting, not to exceed 5 cents per mile.

"Section 6. That Section 10996 of Article 2, Chapter 74, Revised Statutes of Missouri, 1939, be and the same is hereby repealed."

The assessors of the third class counties are compensated by fees provided for in the above sections. These fees are collected for certain duties which are set out in House Bill 469 of the 63rd General Assembly. Of course, this bill provides that certain duties must be performed within a specified time but neither in this bill nor in House Bill 891 is there any mention of the term for which the assessor receives said compensation. However, Section 8 of said bill also provides that he must keep up the transfers in the "land list." We believe this is an indication that the Legislature intended that his duties would continue throughout the year. Also, Section 10943, R. S. Mo. 1939, provides that an assessor shall hold his office for a term of four years or until his successor is duly elected and qualified. This means that he will be a public officer for this time and should be in his office during the regular office hours so that he may serve the public if they should choose to call on him for information or help.

Section 13450, R. S. Mo. 1939, provides in part as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. * * *"

Here again we see that the Legislature intended that the assessor should be compensated for his duties for one year and not for a few months.

Section 10945, R. S. Mo. 1939, provides:

"Assessors elected under the provisions of this chapter shall enter upon the discharge of their duties on the first day of June next after they shall have been elected, and shall hold their offices for the term of four years, and until their successors are elected and qualified."

Since the term of the assessor is from June to June, we believe, in reading the above section and Section 13450, supra, together, that his "basic compensation" of \$5,000.00 per year would be computed from June 1st of one year to May 31st of the next year. We note that House Bill 469 provides that in 1948 an assessor is to be elected in all counties except counties with township organization but will not enter upon the discharge of his duties until September next following his election. Therefore, the present assessors would continue in office until September in 1949.

Conclusion

It is, therefore, the opinion of this department that assessors of third class counties receive an annual compensation for duties performed from June 1st of one year to May 31st of the next year.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:EG

STATE TEACHERS COLLEGES: The Central Missouri State Teachers College is unauthorized to accept money from the Federal Government under Title V, Public Law 458, 78th Congress. The acceptance of such money would be a contract without express authority of law in contravention of Section 39 (4), Art. III, Const. 1945.

CONSTITUTIONAL LAWS:

February 8, 1946

FILED

23

President G. W. Diemer
Central Missouri State Teachers College
Warrensburg, Missouri

Dear President Diemer:

This will acknowledge receipt of your letter of recent date in which you request an opinion of this department as follows:

"We wish to complete plans for dormitories and other buildings which we hope to erect on this campus at the earliest date possible. As you know, the Federal Government, under Title V, of Public Law 458--78th Congress, is advancing money to public agencies to make possible the planning of buildings and other projects. This money is to be repaid if and when the construction of the public work so planned is undertaken. May I inquire whether or not in the opinion of your department, the Central Missouri State Teachers College could accept such advances with the obligation of repayment. An opinion from your office will be appreciated."

Title V, Public Law 458, 78th Congress, to which you refer in your letter, reads as follows:

"Sec. 501. (a) In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works (not including housing), the Federal Works Administrator is hereby authorized to make, from funds appropriated for that purpose, loans or advances to the States and their agencies and political subdivisions (hereinafter referred to as 'public agencies') to aid in financing the cost or architectural, engineering, and economic investigations and studies, surveys, designs, plans, working drawings, specifications,

procedures, and other action preliminary to the construction of such public works: Provided, That the making of loans or advances hereunder shall not in any way commit the Congress to appropriate funds to undertake any projects so planned.

(b) Funds appropriated for the making of loans or advances hereunder shall be allotted by the Federal Works Administrator among the several States in the following proportion: 90 per centum in the proportion which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 10 per centum according to his discretion: Provided, That the allotments to any State shall aggregate not less than one-half of 1 per centum of the total funds available for allotment hereunder: Provided further, That no loans or advances shall be made with respect to any individual project unless it conforms to and over-all State, local, or regional plan approved by competent State, local, or regional authority.

(c) Advances under this section to any public agency shall be repaid by such agency if and when the construction of the public works so planned is undertaken. Any sums so repaid shall be covered into the Treasury as miscellaneous receipts.

(d) The Federal Works Administrator is authorized to prescribe rules and regulations to carry out the purposes of this section.

(e) As used in this section, the term 'State' shall include the District of Columbia, Alaska, Hawaii, and Puerto Rico."

Section 10760, R. S. Mo., 1939, Mo. R.S.A., p. 766, provides, in part, as follows:

"Each state teachers college shall be under the general control and management of its board of regents, * * *"

Section 10771, R. S. Mo., 1939, Mo. R.S.A., p. 772, provides as follows:

"No president, professor, teacher, regent or other officer or employee shall keep for sale or be interested, directly or indirectly, in the sales of any school furniture or apparatus, books, maps, charts or stationery used in said colleges; nor be interested, directly or indirectly in any contract or purchase for building or repairing any structure, or for fencing or ornamenting the grounds, or furnishing any supplies or material for the use of such state teachers colleges."

The above sections of Chapter 72, R. S. Mo., 1939, relating to State Teachers Colleges, provide that the Board of Regents of said colleges shall have the complete control and management of such colleges and Section 10771, supra, provides that the officers of the teachers colleges shall have no interest in contracts for the erection of buildings. These sections indicate that the Board of Regents are to supervise the planning and erection of buildings in connection with said colleges.

This proposition was accepted in State ex rel. Thompson vs. Board of Regents (1924), 305 Mo. 57. In that case the Supreme Court of Missouri held that funds which the Board of Regents of the Northeast Missouri State Teachers College had received from insurance coverage on buildings insured by the said Board, and which were destroyed by fire, were not required to deposit such funds in the State Treasury. The Board of Regents had expended some of the money so received to partially replace the structures destroyed by fire. The court, in discussing the discretion of the Board with regard to the latter action, said: (l.c. 66 and 67)

"Among other expenditures which have been made by the board in the exercise of its discretion is that for insurance upon the buildings and equipment of the college. Lacking express statutory authority for its action the beneficiary named in the policies thus obtained, was the board. When the loss occurred the amounts due under the contract was paid, as it should have been, to the board. In furtherance of its discretion it proceeded at once to expend a portion of the money thus received in repairs necessary for the protection of certain damaged buildings and to partially replace the library. When this writ was served the board was taking steps to replace the destroyed buildings. It is charged with no wrong doing or the usurpation of any power which has

not at least received tacit legislative and public approval for a half century. These facts are entitled to more than persuasive consideration in determining the question here seeking solution. Absent qualifying incidents they may arise to the dignity of ruling decisions. (State ex rel. v. Gordon, 266 Mo. 412; Folk v. St. Louis 250 Mo. 141.) * * *

The question in the instant situation, however, is not that of whether the Board of Regents may use their discretion in the planning and erection of buildings, the erection of which have been authorized and the funds therefor provided (or, as in State v. Board of Regents, supra, where the college has funds already available), but rather that of whether the Board of Regents can make a contract with the United States Government binding an agency of the State of Missouri to pay back money borrowed. The latter, in our opinion, is the effect of an acceptance by the Board of Regents of federal funds under Article V of Public Law 458, 78th Congress.

Section 39, Article III, Constitution 1945, limits the powers of the General Assembly. That section reads, in part, as follows:

"The general assembly shall not have power;

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; (Ibid)"

Under Section 39(4), Article III, Constitution 1945, the Board or Regents, in order to bind the State for the payment of any money, is required to have express authority for such action.

The proposition that educational institutions have no power to borrow money without express authority to do so is well settled. In Alabama College v. Harman (1939 Ala.) 175 So. 394, the Board of Trustees of Alabama College proposed to issue bonds to cover the costs of erecting a co-operative house dormitory. The bonds were to be secured by pledging student fees, rentals received from said dormitory, and a mortgage upon the property. The President of said cooperation refused to sign the resolutions of the Board of Trustees which would cause the bonds to be prepared and issued. The authority of the Board of Trustees of the Alabama College was very similar to that which is given to the Board of Regents of the State Teachers Colleges of Missouri. The suit was for a declaratory judgment

adjudging it to be the duty of the president to sign the necessary instruments to authorize the issuance of the bonds. The Supreme Court of Alabama reversed the decree of the Circuit Court in so far as it decreed that Alabama College had the legal right and authority to issue bonds to finance the construction of the dormitories. In discussing the authority of the college to borrow money the court said: (l.c. 397)

"We fail to find in the act of the Legislature creating the complainant--corporation, or in any of the acts amending the original act, any express power to borrow money, or any power to pledge the revenues of the institution, or any power to execute a mortgage, or deed of trust on any of its properties. Nor do we find any implied power in this corporation to do such acts."

* * * * *

"(2) Counsel for appellant has pressed upon our attention the holdings of this court in the cases of Kelly v. Trustees of Alabama C. R. R. Co., 58 Ala. 489, Talladega Ins. Co. v. Peacock, Adm'r., 67 Ala. 253, and Taylor v. Agricultural & Mechanical Ass'n of West Alabama, 68 Ala. 229, as authorities holding that corporations have ordinarily the right to borrow money, and to secure it by mortgage upon its property. These cases were dealing with private corporations, and not public or quasi public corporations, created by the state, and intended as an agency of the state, to enable it to carry out governmental purposes. Consequently, being mere agencies of the state, created by statute, their authority must be found in the law creating them, or thereafter conferred upon them, unaided by any common-law rights inhering in a strictly private corporation."

"(3) There is nothing in the case of Kimmons v. Jefferson County Board of Education, 204 Ala. 384, 85 So. 774, or in the case of Turk v. County Board of Education of Monroe County, 222 Ala. 177, 131 So. 436, which in any wise contravenes the general principle that a municipal corporation, or a public, or quasi public corporation, cannot, without express legal authorization borrow money, and pledge its property as security therefor."

Upon application for rehearing, the attention of the Court was, for the first time, called to an act of the Legislature of Alabama, General Acts of 1939, page 1064, which reads as follows:

"To provide authority for the State Board of Education and/or the trustees of all State Institutions, where education is a part of the program of the Institution, to borrow money from Federal Agencies for the erection of buildings, beautification of grounds, and the erection and maintenance of swimming pools at the several State Institutions; to authorize the issuance of bonds, warrants or other evidences of debt for the repayment of the amount borrowed with interest at a rate not to exceed four per cent semi-annually, and to pledge therefor the fees from students to be levied by the Institution for which the money is borrowed, and any other moneys not appropriated by the State to said Institution; to make such bonds, warrants or other evidences of debt not an obligation of the State and not payable out of any moneys provided by the State."

The Court on rehearing said: (l.c. 398)

"(5) All that need be said is that the bill, as filed in this case, clearly does not seek a declaratory judgment or decree as to the right of the complainant to borrow money from the federal government, or from any federal agency, as provided in said act. On the contrary, it seeks a declaratory judgment as to whether it had power generally to borrow the money and pledge the properties of said institution for its payment.

As to all other questions argued by appellant, in his brief filed on rehearing, we find nothing to convince us that we were in error in the opinion heretofore rendered. * * *

The pleadings were later redrawn in such manner as to indicate that the college was acting under the above quoted act of the Alabama Legislature, and thus the question of the authority to borrow money was eliminated from the case. The case was then refiled and decided upon other grounds which are not

pertinent to the present discussion. The court, therefore, under facts very similar to those now under consideration, held that a school corporation must have express authority in order for it to borrow money.

In another Alabama case, *Keller v. State Board of Education of Alabama* (1938 Ala.) 183 So. 268, the Supreme Court of Alabama had before it the question of whether the State Board of Education of Alabama could properly mortgage certain property belonging to the State Teachers College of Florence, Alabama, as security for a loan from the United States Government granting money to the State of Alabama for the construction of a physical education building and a swimming pool at the State Teachers College. The court in that case said: (l.c. 270)

"* * * Authority for this improvement is based on General Acts of 1935, p. 1064, under which all state educational institutions are granted the right to borrow money from Federal agencies for the erection of buildings, beautification of grounds, etc., and to comply with the requirements of the Federal agencies in reference to monies so loaned to issue bonds or warrants for the payment of same, and to pledge therefor fees from students to be levied by the institution and other monies not appropriated by the State. * * *"

Other states have held similarly on the question of the authority of officers of educational institutions to contract indebtedness without express authority of law. In *Hard v. Depaoli* (1935) 41 Pac. (2d) 1054, the Supreme Court of Nevada, in discussing the authority of the Board of Trustees of a public school district to contract indebtedness, said: (l.c. 1057)

"* * * By those acts they are brought into existence as political subdivisions of the state, formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children; their functions defined, and such powers as they may exercise conferred upon them. They have no inherent right to vote bonds or negotiate loans; such right must be derived from statute, and in voting such bonds or providing for such loans, the statute must be substantially complied with."

In *Powell v. Bainbridge State Bank* (1926) 132 S.E. 60, the Supreme Court of Georgia, in discussing the same question, said: (1.c. 61)

"* * *The grant of power to public officers to borrow money which must be repaid by the taxpaying public cannot be implied. Such power rests upon an express grant, subject to such restrictions and limitations as the lawmaking power may see fit to impose."

The same holding was made in *Kite School District v. Clark* (1931 Ga.) 156 S.E. 618.

The same principal is stated in the textbooks. In 14 C.J.S. p. 1354, we find the following:

"Generally speaking the governing body of a state college or university is regarded as a distinct legal entity so far as its debts are concerned and lacks authority to contract indebtedness collectable from the state; * * *"

While an educational institution, and thus the officers thereof, may have the implied power to borrow money, such power exists only when it is necessary that this be done to maintain and operate the schools in accordance with and in the manner provided by statute. The implied power ordinarily occurs only when a purpose expressly authorized by statute cannot be accomplished without such power. *Logan v. Board of Public Institutions of Polk County* (1945 Fla.) 158 So. 20; *Watkins v. Ouachita Parish* (1931 La.) 136 So. 591; *Union School Township v. First National Bank of Crawfordsville, Ind.* (1885 Ind.), 2 N.E. 194.

Under section 39 (4), Article III, Constitution 1945, the Board of Regents in order to bind the State for the payment of any money is required to have express authority for such action.

An examination of Chapter 72, R. S. Mo., 1939, including Section 10760, supra, and 10771, supra, reveals no such express authority given to the Board of Regents to make a contract binding the State for repayment of money.

Section 9363, R. S. Mo., 1939, sets up a fund in the State Treasury for the Central Missouri State Teachers College and provides that all money derived from the Institution shall

be placed to the credit of said fund. Section 9370 R. S. Mo., 1939, Mo. R. S. A., p. 635, relating to the appropriation of money by the state for the support of the Institutions mentioned in Section 9363, provides, in part, as follows:

"* * *No money appropriated by the state for building any addition to any institution, or any house or permanent building pertaining thereto, or for any machinery or repairs of any machinery or building there-to belonging, shall be paid to such institution until the board of managers shall have filed with the state auditor an itemized statement of the costs of such building, machinery or repairs, together with a statement that the work has been done, or machinery or materials furnished, equal in value to the amount for which the requisition is drawn; which statement shall be entered upon the minutes of the board and shall be subscribed and sworn to by the president of such board of managers. R. S. 1929, Sec. 8673."

Section 9372, R. S. Mo., 1939, Mo. R. S. A., p. 640, and 641, provides, in part, as follows:

"* * *No money appropriated by the state for building any addition to any institution, or any house or building pertaining thereto, or for any machinery or repairs of any machinery or building thereto belonging, shall be paid to such institution until the proper officer, whose duty it is to sign a requisition, shall have filed with the state auditor an itemized statement of the costs of such building, machinery or repairs, together with a statement that the work or machinery or material furnished is equal in value to the amount for which the requisition is drawn, which statement shall be sub-

scribed and sworn to by the officer or other person whose duty it is to make and sign the requisition. R. S. 1920, Sec. 8675."

It will readily be seen that the above sections give no authority to the Board of Regents of the State Teachers Colleges to borrow money.

The Missouri Legislature has enacted no law corresponding to that passed by the Georgia Assembly and referred to in *Alabama College v. Harman*, supra, (said act quoted above in this opinion). The only Missouri statute which deals with Federal aid to educational institutions is Section 10525, Laws of Missouri, p. 553. That Section reads as follows:

"That the provisions of the act of congress enacted by the sixty-fifth congress at the second session thereof, entitled 'An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries and home economics; to provide for co-operation with the states in the preparation of teachers of vocational subjects; and to authorize the appropriation of money and regulate its expenditures' and approved (February 23, 1917); that the provisions of the act of congress, Public No. 673, enacted by the seventy-fourth congress, entitled 'An act to provide for the further development of vocational education in the several States and Territories' and approved (June 8, 1936); that the Public Law 668, Chapter 437, 76th Congress, Third Session, Public Law 812, Chapter 750, 76th Congress, Third Session, and Public Law 812, Chapter 780, 76th Congress, Third Session, providing training in occupations essential to National Defense, and any other subsequent acts of congress which may provide federal funds for public schools or other educational agencies and for the necessary administration and supervision of the same, be and the same are hereby accepted."

We are of the opinion that this section does not give the Board of Regents of State Teachers Colleges the right to enter into a contract for the repayment of funds borrowed from the Federal Government. The Section does not expressly grant the right to incur obligations for the repayment of money. It merely provides that federal funds for educational agencies shall be accepted by the State. The laws of Congress, which are mentioned in that Section, are all laws which provide for outright gifts to the state of the funds provided therein. They provide that the funds given to the State shall either be matched by the State or that the expenditure of money by the State shall be completely reimbursed by the Federal Government. We think, therefore, that this Section does not give the Board of Regents the required authority in the instant situation because (1) the laws specifically mentioned do not provide for a repayment of the money granted by the Federal Government and (2) while the Act refers to "other subsequent acts of Congress which may provide federal funds for public schools or other educational agencies", it provides merely that these funds are "hereby accepted", and not that the state or its agencies may incur the obligation to pay back any money thus received.

Finding no express authority for the same, we are, therefore, of the opinion that the incurring of an obligation by the Board of Regents of Central Missouri State Teachers College for the repayment of the federal funds loaned under Title V, Public Laws 458, 78th Congress, would be an agreement or contract made without express authority of law. The payment of the obligation would thus be prohibited by Section 39(4) of Article III, Constitution of 1945.

CONCLUSION.

It is, therefore, the opinion of this department that the Board of Regents of Central Missouri State Teachers College could not, under present statutes of Missouri, accept advances of money from the Federal Government, under Title V, of Public Law 458 of the 78th Congress, with the attendant obligation of repayment.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

2 P J. Smith

SALARIES: City of St. Louis is entitled to all fees and
mileage paid by State Auditor for transportation
FEES: of prisoners to Penitentiary under Section 13413,
R. S. Mo. 1939.

July 6, 1946

7/9

FILED

23

Honorable Paul Dillon
Attorney-at-Law
907 Bank of Commerce Bldg.
St. Louis, Missouri

Dear Sir:

The Attorney General acknowledges receipt of your letter in which an official opinion was requested and which reads as follows:

"I am attorney for the Sheriff of the City of St. Louis and am confronted with the following problem concerning which I would like your official opinion.

"It has been the practice of the Sheriff of the City of St. Louis in taking prisoners from St. Louis to the Missouri State Penitentiary to act as follows:

"He awaits until sufficient prisoners have accumulated so as to justify having a car for just the prisoners. This car is provided by the Missouri Pacific Railroad which transports the prisoners and Guards from St. Louis to Jefferson City and advances in cash \$2.75 to each Guard or Deputy Sheriff for his expenses not including his railroad fare for the trip. The prisoners are delivered to the penitentiary and a receipt taken for them. The receipt is then presented to the State Auditor's Office which draws a check, made payable to the City of St. Louis, and the Sheriff turns the same over to the Sheriff's Office which holds said check until the Sheriff receives a bill from the Missouri Pacific and when he does he draws a check payable to the Missouri Pacific for that bill and deposits the difference in the Sheriff's Office account. There has now arisen a question as to who is entitled to the amount paid by the State Auditor over the actual amount paid the

Missouri Pacific, which is the entire cost of transportation of the prisoners. The City of St. Louis contends that it is entitled to this amount. I do not know just how the Auditor comes to pay this bill but, if he pays it as he does, I believe he is entitled to this overpayment. However, I will be guided by your official opinion and wish you would let me know so I can inform the Sheriff as soon as possible."

Chapter 145, R. S. Mo. 1939 contains the laws especially applicable to the City of St. Louis. Article 1 pertains to the Sheriff and Coroner, and Section 15671 of said article, in part, provides as follows:

"All general laws relating and applicable to the sheriffs and coroners of the several counties of this state shall apply to the same officers in the City of St. Louis,* * *"

Section 13413, R. S. Mo. 1939, provides for certain fees to be allowed sheriffs and other officers, and that portion of Section 13413, relating to fees allowed in connection with transporting prisoners to the State Penitentiary, provides:

"* * *For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary; the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each convict while being taken to the penitentiary; and all persons, convicted and sentenced to imprisonment in the penitentiary at any term or setting of the court, shall be taken to the penitentiary at the same time, unless prevented by sick-

ness or unavoidable accident. In cities having a population of two hundred thousand inhabitants or more, convicts shall be taken to the penitentiary not oftener than twice in any one month. When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners; and before any claim for taking convicts to the penitentiary is allowed, the sheriff, or other officer conveying such convict, shall file with the state auditor an itemized statement of his account, in which he shall give the name of each convict conveyed and the name of each guard actually employed, with the number of miles necessarily traveled and the number of days required, which in no case shall exceed three days, and which account shall be signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delivered at the penitentiary and were accompanied by each of the officers and guards named in the account. * * *

Under the above section, the sheriff of the City of St. Louis would have a claim against the State Auditor for the necessary fees and mileage for himself, the guards employed, and the prisoners, legitimately incurred and allowed under the statute each time a group of prisoners is transported to the Penitentiary, and we assume that each time the sheriff transports prisoners to the Penitentiary, he files a true and correct itemized sworn statement with the State Auditor, giving the name of each convict conveyed, names of guards employed, number of miles necessarily traveled, and number of days required, and that he also submits the proper certificate, signed by the Warden of the Penitentiary, as is required by the statute.

The only time the state would be entitled to recover money paid in connection with the transportation of prisoners to the Penitentiary would be in the case where a payment was made in excess of the amount authorized by law, or where there was an unauthorized payment. The rule was stated in the case of Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857, 1.c. 861:

"* * * 'As a general rule any compensation paid to a public official by the state or other governmental body not authorized by law, or in excess of the compensation authorized by law, may be recovered by the proper governmental body * * *.' 46 C. J. 1030, Sec. 285."

In the case at bar it does not appear that an excessive or unauthorized payment was ever made.

In the City of St. Louis the sheriff, his deputies and assistants, are compensated for their services by salary paid by the City. All fees earned by the sheriff are turned over to the City. Thus, it is provided in Section 15672, R. S. Mo. 1939, which, in part, reads:

"All fees earned by the sheriff of the City of St. Louis during any calendar month, shall be paid into the treasury of the city of St. Louis on or before the 10th day of the next succeeding calendar month. He shall keep a complete itemized account of all such fees, and of all expenses incurred by him in the discharge of the duties of his office. * * *"

While the fees earned by the sheriff are to be paid into the Treasury of the City of St. Louis, Section 15677, R. S. Mo. 1939 further provides that the necessary expenses incurred by the sheriff in connection with the conduct of his duties shall be paid by the City.

CONCLUSION

It is, therefore, the opinion of this department that under Section 13413, R. S. Mo. 1939, certain fees and mileage are allowed in connection with the transportation of prisoners to the State Penitentiary, and when the same is paid by the State Auditor, based upon the sheriff's itemized sworn statement, the City of St. Louis would be entitled to the entire amount paid by the State Auditor which would include any amount remaining after the bill that was submitted by the railroad company is paid.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:DC

PUBLIC SCHOOL RETIREMENT SYSTEM:

May use money collected to maintain office and incidental expenses.

FILED

24

February 5, 1946

2-14

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System
Department of Public Schools
Jefferson City, Missouri

Dear Sir:

General Taylor wishes to acknowledge receipt of your request for an opinion, which reads as follows:

"Our Board of Trustees would appreciate an opinion on this question concerning House Bill 151: 'Does the Board have the right to spend money collected for the maintenance of the office and incidental expenses.'"

It is expressed in the title of House Bill 151 as one of its purposes that it is an Act " * * to provide for the creation, maintenance, and administration of a retirement system for public school teachers, to be known as the Public School Retirement System of Missouri, * * *"

In furtherance of that purpose, we direct your attention to sub-section (1), Section 3, regarding the income of the Public School Retirement System, wherein it is provided:

"The funds required for the operation of the retirement system created by this Act shall come from contributions made in equal amounts by members of the system and their employers, and from such interest as may be derived from the investment of any part of such contributions. All contributions shall be transmitted to the board of trustees by employers in such manner and at such times as the board by rule shall require."

Regarding the funds arising from this section, sub-section (1) of Section 4 of House Bill 151, thereafter provides:

"All funds arising from the operation of this Act shall belong to the retirement system herein created and shall be controlled by the board of trustees of that system, which board shall provide for the collection of said funds, shall see that they are safely preserved, and shall permit their disbursement only for the purposes herein authorized. All funds when collected shall be deposited with the custodian. The said funds and all other funds received by the retirement system are declared and shall be deemed to be the monies and funds of the retirement system and not revenue collected or moneys received by the State and shall not be commingled with State funds."
(Underscoring ours.)

The purposes authorized for the disbursement of these funds are found in sub-section (2) of Section 4, which provides:

"The board shall invest all funds under its control, in excess of a safe operating balance; but investments shall be made only in the following classes of securities; bonds, or other obligations of the United States, bonds guaranteed by the United States, bonds of the State of Missouri, bonds of a county of the State of Missouri, bonds of a city of the State of Missouri, bonds of a school district of the State of Missouri. No investment transaction authorized by the board shall be handled by any company or firm in which a member of the board has an interest, nor shall any member of the board profit directly or indirectly from any such investment. All investments shall be made in the name of the retirement system." (Underscoring ours.)

Provision is made for an office, which will house the headquarters of the system, by sub-section (19) of Section 2, which reads as follows:

Mr. G. L. Donahoe - 3

"The headquarters of the retirement system shall be in Jefferson City, where office space suitable for the operation of the system shall be provided by the Board of Permanent Seat of Government."

In the discharge of its statutory duties, the Public School Retirement System will necessarily encounter some expenses from time to time. The maintenance of the office provided by virtue of sub-section (19), Section 2, supra, and incidental expenses connected therewith are examples of such expenses.

The expenses referred to in your letter are necessarily acquired in the carrying out of the purposes of House Bill 151 and merely incidental to the operation thereof, and may be accounted for as part of the operating balance set aside by sub-section (2) of Section 4, supra.

Conclusion

It is, therefore, the opinion of this department that the Board of Trustees of the Public School Retirement System may use such part of the funds it collects for the purpose of maintaining its office and necessary expenses incidental thereto.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

PUBLIC SCHOOL RETIREMENT SYSTEM:

Prior service credit not allowed in PSRS under House Bill 151 for time served in the armed forces by a teacher.

May 16, 1946

FILED

24

5/17

Honorable G. L. Donahoe
Executive Secretary
Public School Retirement System
Jefferson City, Missouri

Dear Mr. Donahoe:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"We would appreciate an opinion on the following question concerning House Bill 151:

"Does the Board of Trustees have the power to allow prior service credit for time served by teachers in the armed forces of the United States during a period of war?"

"We would appreciate an early consideration of this question, since we plan to ask for an amendment to the Retirement Act if the Board of Trustees does not have the power to grant prior service credit under the above-mentioned condition."

House Bill 151, referred to in your request, was amended by House Bill 642. In the latter bill "prior service" is defined in Section 1, subsection (13) as, "service rendered by a member of the retirement system before the system becomes operative, for which credit has been approved by the board of trustees."

The only part of House Bill 151 in which reference is made with regard to prior service credit of those in the armed forces, is found in Section 5, subsection (4), which provides:

"(4) No prior service credit shall be granted to any person who becomes a member after the first year of the system's operation, unless that person's failure to become a member before or during that year was due either to service in the armed forces of the United States or to attendance at a recognized educational institution for his professional improvement. A person serving in the armed forces of the United States shall have the same right to prior service credit as one who became a member before the end of the first year of the system's operation, if he becomes a member within one year of the date of his discharge from such service or within one year of said date plus time spent as a student in a standard college or university in further preparation for service as a public school employee. A person attending a recognized educational institution for his professional improvement shall have the same right to prior service credit as one who became a member before the end of the first year of the system's operation, if he becomes a member within three years following the date on which the system became operative, and within one year of the date on which his attendance at said institution ceased."

Under Section 5, subsection (2) of House Bill 151, those persons who are not in the armed forces may become members of the Public School Retirement System before the end of the school year next following the date on which the system becomes operative and claim prior service credit. Section 5, subsection (4), House Bill 151, supra, further allows those who are in the armed forces a greater period of time in which to become members of the system.

There is no provision in House Bill 151 by which a teacher in the armed forces may claim service credit in the Public School Retirement System during the period that they are in the armed forces. In the absence of such provision the Board of Trustees of the system would be unauthorized to allow such claim. Our advice, therefore, is, that if the Board of

Honorable G. L. Donahoe - 3

Trustees desires to grant service credit for teachers in the Public School Retirement System during the time they have served and are serving in the armed forces, an amendment to that effect would be necessary.

Conclusion

It is the opinion of this department that House Bill 151 does not authorize the Board of Trustees of the Public School Retirement System to allow prior service credit for time served by teachers in the armed forces of the United States during a period of war.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

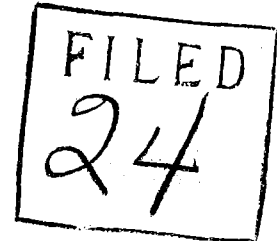
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

SHERIFF'S FEES: Sheriff is entitled to retain fees earned in juvenile proceedings.

July 18, 1946



Mr. Elvin S. Douglas
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This department is in receipt of your recent letter requesting an opinion on the following facts:

"Within the meaning of the Acts of the Legislature relating to the compensation of sheriffs, do you consider the services of the sheriff in serving a summons on parents, and warrants on their minor children who are alleged to be delinquent, and his other services related thereto, such as transporting said juveniles, who are alleged to be delinquents, to another county where they have adequate facilities for caring for such children, as criminal work, for which he is paid a salary, or as civil work in connection with which he would be entitled to retain all fees earned?

"Would your opinion be any different in cases where the notices served on parents in the nature of a summons, and the warrants or orders by the clerk to take children in custody, where it is alleged that the children are neglected instead of being delinquent."

Your attention is called to Section 96.73, R.S.Mo. 1939, which defines neglected and delinquent children. Without

quoting the section, which is very long, we will say that the definition of a delinquent child includes the violation of the criminal laws and many other violations of moral and social regulations. The definition of a neglected child is practically the same, except that it does not include violations of the criminal statutes.

Section 9674, R.S. Mo. 1939, provides that the juvenile court shall have jurisdiction to try persons charged as delinquents and neglected children. This section also provides that the trial of such a proceeding shall be governed by the rules of Criminal Practice and Procedure.

Article VI, Section 13 of the 1945 Constitution, which defines the duties of the sheriff in criminal matters, is as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

You will note that this section provides a salary for his services in connection with persons accused of or convicted of a criminal offense. The question, therefore, would be, is the trial of delinquent and neglected children a matter in connection with a person accused or convicted of a criminal offense.

Section 9700, R.S. Mo. 1939, provides that any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general criminal laws. As can be readily seen, this section specifically states that such child is alleged to be a delinquent and not, in such proceeding, accused of a criminal offense.

The Supreme Court of Missouri, in passing upon the question as to whether or not a delinquency proceeding is the prosecution of a criminal offense, said in the case of State v. Trimble, 63 S.W. (2d) 37, 1.c. 38, 39 (the opinion is lengthy, but we have set it out here because it definitely decides the question):

"From the opinion of the Court of Appeals we learn that the defendant, Witt, was proceeded against in the juvenile court at Kansas City, Mo. The probation officer filed an information against Witt alleging that he was under the age of seventeen years. It further alleged or charged that Witt was a delinquent child within the meaning of the law, that he had committed the crime of seduction, and that he was guilty of the crime of rape. The court charging rape was dismissed. No preliminary hearing was granted. A trial before a jury in the juvenile court resulted in a verdict of guilty as charged in the information. Thereupon the juvenile court, or judge, entered a judgment finding that Witt was a delinquent child within the meaning of the law, and imposed a sentence of four years' confinement in the Missouri Reformatory at Boonville, Mo.

"From this sentence Witt asked that he be granted an appeal to the Supreme Court. The trial court, however, granted the appeal to the Kansas City Court of Appeals, which court assumed jurisdiction of the case, and reversed and remanded it for a new trial. * * * * Respondents, judges of the Court of Appeals, are represented in this court by counsel who represented Witt in the Court of Appeals. He has briefed the case for respondents, and, while he is satisfied with that part of the opinion reversing and remanding the case for a new trial, he contends here, as he did in the Court of Appeals, that his client, Witt, had been convicted of a fel-

ony, and therefore the Supreme Court, and not the Court of Appeals, had appellate jurisdiction of the case.

"The only theory upon which this court would have appellate jurisdiction of this case is that the act charged by the information of the probation officer against Witt, which is alleged to have rendered him a delinquent child, was a felony. If it can be said that defendant was convicted of a felony by the proceedings against him in the juvenile court, then the whole proceeding was null and void. *State ex rel. v. Walker and Ex parte Bass, supra*. Prosecutions for felony can only be instituted by information of the prosecuting attorney after a preliminary hearing has been had, or by an indictment of a grand jury.

"The Juvenile Act, article 8, chapter 125, R.S. Mo. 1929 (section 14136 et seq. (Mo. St. Ann. Sec. 14136 et seq.)), is a complete law within itself, dealing with minors under the age of seventeen years. The purpose of the Juvenile Law is not to convict minors of criminal acts, but to safeguard and reform children that may have erred and have been declared delinquent and to provide for children that may be declared neglected. For a full discussion of the purposes of juvenile laws see *Ex parte Januszewski (C.C.) 196 F. 123; 31 C. J. 1101, Sec. 226*. The Juvenile Act authorizes the juvenile judge, if he deems that a child is not a fit subject to be dealt with in the juvenile court, to dismiss the proceedings and order the child to be prosecuted under the general law. Section 14163, R.S. Mo. 1929 (Mo. St. Ann. Sec. 14163). A minor under the age of seventeen years cannot be convicted of a crime in a proceeding in a juvenile court, as the term 'conviction' is understood in law. *State ex rel. v. Walker and Ex parte Bass, supra; State v. Naylor, 328 Mo. 335, 40 S.W. (2d) 1079, loc. cit.*

1082 (6). The juvenile court can only adjudicate a child a neglected child or a delinquent child. The two terms have a distinct and separate meaning under the Juvenile Act. A child may be of good character, and yet, through no fault of its own, be declared a neglected child. A delinquent child means one who has been guilty of violations of the law or is incorrigible, vicious, or immoral. Section 14136, R. S. Mo. 1929 (Mo. St. Ann. Sec. 14136); Ex parte Naccarat, 328 Mo. 722, 41 S.W. (2d) 176. If a child is proceeded against as a delinquent, the final judgment of the juvenile court, if against the child, can only be a judgment declaring it to be delinquent. It is immaterial whether the misconduct charged against the child, by the information, consists of violations of the criminal statutes or of conduct, though not violations of the law, which nevertheless renders the child incorrigible, vicious, or immoral. In either case the judgment must be that the child is a delinquent. The juvenile court then has the authority to place the minor on probation or in some institution other than the penitentiary. Section 14151, R. S. Mo. 1929 (Mo. St. Ann. Sec. 14151); Ex parte Bass, supra; 31 O. J. page 1111, Sec. 245.

"Section 14137, R.S. 1929 (Mo. St. Ann. Sec. 14137) provides that the procedure governing the conduct of criminal cases shall be followed in those cases in the juvenile courts where a child is charged with acts that are violations of the criminal statutes. It also provides that a trial by jury may be had. This, however, is not mandatory except when demanded. In all other cases trial by jury is not authorized. The provisions of the above section do not transform the case into a criminal prosecution, but only prescribe the manner in which the trial should be conducted, as was said by this court in State ex rel. V. Buckner, 300 Mo. 359, 254 S.W. 179, 182 (9, 11): 'The charge is that he is a delinquent child, and

the proof of it is alleged to be that he is guilty of rape. It is not sought to punish him as a rapist, but to reform him from his state of delinquency.'

"Section 14136, R.S. Mo. 1929 (Mo. St. Ann. Sec. 14136) provides: 'Any disposition of any delinquent child under this article, or any evidence given in such cases shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this article.'

"This proviso clearly indicates that any disposition of a case in a juvenile court shall not be considered a conviction of crime. It protects the child, in that the adjudication of delinquency cannot be later referred to in any proceeding, either civil or criminal, except in a subsequent case in the juvenile court. A conviction of crime under the law may always be used against a person in either civil or criminal cases. This court in banc in *State ex rel. v. Buckner*, supra, 300 Mo. 359, 254 S.W. loc. cit. 181 (3, 5) said: 'A proceeding under the act, the aim of which, as in this case, is the exertion of the state's power, *parens patriae*, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guaranties respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions.' (Italics ours.)

"Many cases from other jurisdictions are cited as authority for that holding. See, also, 31 C. J. p. 1105, Sec. 231, 232; *Ex parte Naccarat*, 328 Mo. 722, 41 S.W. (2d) 176, loc. cit. 178 (4, 5). The case not being a criminal prosecution, it follows that the Court of Appeals properly retained jurisdiction of it. We have treated this question somewhat at length because of the

vigorous oral argument, by attorney for Witt, to the effect that his client had been convicted of a felony, and that the proceeding in the juvenile court was a criminal prosecution and not a civil proceeding. The Court of Appeals by its opinion correctly disposed of this question."

There can be no doubt, after reading this opinion, but what the nature of a delinquency proceeding is not criminal and that the person charged is accused as a delinquent and not a person accused of a criminal offense, as provided by the Constitution of 1945.

Conclusion.

It is the opinion of this department that the sheriff is entitled to retain the fees accruing to his office in juvenile proceedings of delinquent and neglected children.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DEPARTMENT OF AGRICULTURE: Warehousemen licensed under Art. 1, Chap. 141, R.S. Mo. 1939, not subject to provisions of House Bill 164.



August 3, 1946

8/16

Honorable Tom R. Douglass
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for our official opinion on the following question:

There are several warehousemen in the State, licensed under Article 1, Chapter 141, R. S. Mo., 1939, who also conduct a locker plant business in conjunction with their warehouse business. The insurance carried by some warehousemen is inadequate to cover the minimum of \$40.00 per locker fixed by the Commissioner of Agriculture. Does House Bill 164 apply to these warehousemen?

In your request you also refer to Section 14 of House Bill 164, recently enacted by the General Assembly, and, since an examination of that section is necessary to the determination of the question at hand, it is set out herein:

"Section 14. Every operator shall have a lien upon all property of every kind stored in the locker plant for all locker rentals, processing, handling, and other charges due from owner of such property; and the locker plant operator may enforce the lien by suit and shall have authority to prevent removal of food stored pending the outcome of suit to enforce said lien. Operators of locker plants shall not be construed to be warehousemen, nor shall receipts or other instruments issued by such persons in the operation contracts of their business be construed to be warehouse receipts or subject to the laws applicable thereto, nor

shall the provisions of this Act apply to
any warehouseman licensed under the provi-
sions of Article 1, of Chapter 141 of the
Revised Statutes of Missouri, 1939."
(Underscoring ours.)

We are unable to find any judicial interpretation of this or a similar enactment which is decisive, and must rest our conclusion on the plain wording of Section 14, supra.

The evident meaning of the portion of Section 14 which we have underlined above is to exclude from the operation of the entire act (House Bill 164), all warehousemen who have been licensed in accordance with Section 15477, R. S. Mo., 1939. It may be that the intent could have been to exclude warehousemen, duly licensed, from the operation of the Act unless they were also engaged in the locker business, but this seems a strained construction, and it is a primary rule of law that any interpretation which results in confusion should never be given. (State ex rel. Jamison vs. St. Louis-San Francisco Ry. Co., 300 S. W. 274.)

An examination of the various sections in Article 1, Chapter 141, R. S. Mo., 1939, reveals that the occupation of warehouseman is similar to that of an operator of a cold storage locker business. Section 15476, of Article 1, provides, in part:

"Section 15476. All warehouses or storehouses * * * wherein other property than grain is stored * * * are declared to be public warehouses."

There is provision, also, for protection to the public through a surety bond which must be executed under the provisions of Section 15478 of Article 1, Chapter 141, supra.

A "locker plant" is defined in House Bill 164 as:

" * * * a location or establishment in which space in individual lockers is rented for the storage of food."

Due to the great similarity in the two occupations, it is evident that the Legislature considered the public fully protected by the requirements already made of warehousemen, who were, in some cases, offering cold storage space to the public, and that they intended to exempt warehousemen who were duly licensed.

Honorable Tom R. Douglass - 3

CONCLUSION

In view of Section 14 of House Bill 164, it is the conclusion of this office that warehousemen who are duly licensed under Article 1 of Chapter 141, R. S. No., 1939, are not subject to the provisions of said House Bill 164, commonly known as the "Locker Plant Law."

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

MAGISTRATES: Magistrates may not have any connection with a law suit even though it was filed prior to assuming office.

FILED

25

November 25, 1946

12/2

Mr. A. R. Dunn
Attorney at Law
Rice Building
Neosho, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion dated November 9, 1946, which reads as follows:

"At the recent election I was elected Probate Judge and Magistrate of Newton County, and, as you know, I will not be permitted to continue the practice of law.

"I have a great many cases filed which will not come up for hearing until after the first of the year, and the question has been raised as to whether I will be permitted to wind up that unfinished business after assuming the duties of Magistrate-Probate Judge."

Section 24, Article V of the Constitution of Missouri 1945, provides in part as follows:

" * * * * * No judge or magistrate shall * * * * * practice law or do law business, * * * * *"

Section 3 of Senate Bill 207, passed by the 63rd General Assembly, provides in part as follows:

"No magistrate shall * * * * * practice law or do law business while he is magistrate."

The general rule as to the meaning of negative words in a statute is given in 59 C. J. 1075 as follows:

"It is a general rule that a statute which is negative or prohibitory, although it provides no penalty for noncompliance, or which contains exclusive terms, shows a legislative

November 25, 1946

intent to make the provision mandatory, and it has been said that negative words in a grant of power are never construed as directory;
* * * * *

Therefore, we believe it is apparent from a reading of the constitutional statutory provision that a magistrate, after he assumes the duties of the office is absolutely forbidden to practice law or do law business of any kind whatsoever.

The question of whether you will be permitted to represent clients in cases which have been filed before you assumed the duties of magistrate, but which will not be heard in court until after you have assumed such duties, depends upon whether such activities on your part, after you have assumed the office of magistrate, constitutes practicing law or doing law business.

Section 13313 R. S. Mo. 1939, provides as follows:

"The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

The practice was defined in Clark v. Austin, 340 Mo. 477, 101 S. W. (2d) 977 as follows (the paragraphing is ours) l. c. 954:

November 25, 1946

"It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations, or corporations as to their rights under the law,

or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body committee, or commission constituted by the law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law.

Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law."

State ex rel. McKittrick v. C. S. Dudley & Co., 340 Mo. 852, 102 S. W. (2d) 895, declares both definitions are practically the same while the differentiation made in Liberty Mutual Insurance Company v. Jones 344 Mo. 932, 130 S. W. (2d) 945, has no relation to the facts presented in the instant case.

Under the above definitions it would appear that your connection with a law suit, whether by appearance in court or in an advisory capacity, would constitute the practice of law and/or the doing of law business which a magistrate is forbidden to do by the constitution and statutes.

Mr. A. R. Dunn

November 25, 1946

CONCLUSION

It is therefore the opinion of this department that a magistrate after he assumes the duties of his office may not have any connection with a case which has been filed by him before he assumed the duties of magistrate.

Yours very truly

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:MA

COUNTY COURTS: RE: The County Court of Adair County is not authorized to donate money for a building in which to locate a glove factory in the City of Kirksville, Missouri.

January 2, 1946 .

FILED

26

Mr. Burt Elsea, Presiding Judge
Adair County Court
Kirksville, Missouri

Dear Judge Elsea:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department, which letter reads as follows:

"In order to locate a glove factory in Kirksville, the community is raising funds by donation for the building. The title to the building will be in the name of the City of Kirksville. The County Court of Adair County has been asked for a donation.

Will you please advise us as to whether or not the County can legally donate to this building, and if so, out of which fund should it be paid."

Under date of September 12, 1945, this department rendered an opinion to Honorable Hamp Rothwell, Prosecuting Attorney of Maries County, on the question of whether the County Court of Maries County could donate money to the American Legion Post of Vienna, Missouri for the erection of a building in which to hold American Legion meetings. We held that such a donation of county money by a County Court was unauthorized.

We are of the opinion that the question raised by your letter presents the same legal issue. We are therefore of the opinion that the County Court of Adair County cannot legally do-

Mr. Burt Elsea

-2-

January 2, 1946

nate county funds for a building in which to locate a glove factory in the City of Kirksville, Missouri. Our reasons for so holding are contained in the above mentioned opinion of this department, a copy of which we herewith enclose.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

STATE TEACHERS
COLLEGE:

RE: The money derived from the sale of a car belonging to the Southwest Missouri State Teachers College by the State Purchasing Agent should go into the Southwest Missouri State Teachers College Fund.

*State Teachers
College
New Union
Sec. 15, Art IV*

1946

January 3, 1946

FILED

26

1/10

Dr. Roy Ellis, President
Southwest Missouri State Teachers College
Springfield, Missouri

Dear Dr. Ellis:

This will acknowledge receipt of your letter of recent date regarding the disposition of the proceeds of the sale of an automobile, used by the Southwest Missouri State Teachers College, by the State Purchasing Agent. You request an opinion of this department as follows:

"We are requesting that the proceeds from the sale of this car be placed in the State Treasury to the credit of 'the Southwest Missouri State Teachers College fund'. Are we within our rights in making this request?"

Section 15 of Article IV, Constitution of Missouri, 1945, reads, in part, as follows:

"* * *Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law.* * *" (Underscoring ours.)

Section 13051, R. S. Mo. 1939, reads as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund

for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor: Provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly. Laws 1933, p. 414, Sec. 1."

The above provisions of the statute and the new Constitution of Missouri require that state money be placed to the credit of the fund for which it was collected. Neither of these provisions, however, sets out or provides any method by which one can determine for what particular fund a sum of money has been collected.

Therefore, the determination which we are required to make in this opinion is whether or not there is any authorization for

depositing the money here in question to the credit of the Southwest Missouri State Teachers College Fund.

We find no indication in a decided case as to what fund or funds the money realized from the sale of property by the State Purchasing Agent should be credited. Neither do we find any cases indicating into which fund money realized through the sale of property owned by a State Teachers College or other educational institution should be deposited.

Section 9363, R. S. Mo. 1939, reads, in part, as follows:

"There are hereby established and created in the treasury department of this state the following named funds: * * * 'State Teachers College, fourth district,' (Southwest Missouri State Teachers College) 'State Teachers College, fifth district,' and 'Lincoln University.' Whenever any moneys are paid into the state treasury under the provisions of this article, they shall be receipted for by the state treasurer and placed to the credit of the fund to which they respectively belong, so that money derived from each institution may be placed to the credit of the fund herein provided for that institution. R. S. 1929, Sec. 8666."
(Bracket insert ours.)

The above section sets up a separate fund in the State Treasury for the Southwest Missouri State Teachers College. The last part of the section requires that money "derived" from the institution shall be credited to the fund set up for that institution. Therefore, if the word "derived" is broad enough to include the proceeds from a sale of a car used by the Southwest Missouri State Teachers College, the proceeds from this sale should be placed in the Southwest Missouri State Teachers College fund. If the word is not this broad in its meaning, Section 9363, supra, provides no authorization for depositing this money to the credit of the Southwest Missouri State Teachers College fund.

Webster's International Dictionary defines the word derived as follows: "formed or developed out of something else; derivative; not primary;" The word derive is defined as follows: "3. To cause to come; turn (to or into) bring down (upon);" "4. To receive, as from a source or origin; to obtain by descent or by transmission; to draw;" "5. To trace the origin, descent, or derivation of; to recognize transmission of; to assert or show to proceed (from);"

It will be noted that, under the above definition, money derived from an institution would have to proceed from the institution or arise out of the functions of said institution. In other words, the institution must be the primary source out of which these funds arise or are developed from. It is our opinion that the proceeds of a sale of an automobile which was purchased out of moneys which were formerly a part of the Southwest Missouri State Teachers College fund would be derived from the institution within the meaning of the term as used in Section 9363, supra. We believe this to be true for the following reasons. The moneys which go into the Southwest Missouri State Teachers College fund are moneys which are collected by the officers of the institution in performance of their various functions in operations carried on by the institution. Such moneys come from various fees or charges which the institution is authorized to levy. Arising, as they do, directly out of the functions of the institution, they are "derived" from the institution and, therefore, must be placed to the credit of the institution's fund in the State Treasury. The automobile here in question was purchased out of the Southwest Missouri State Teachers College fund, i.e., a fund which was derived from the institution. It follows that the automobile was derived from the institution and, therefore, that the proceeds from the sale of such automobile are also derived from the institution.

It is, therefore, our opinion that Section 9363, R. S. Mo. 1939, governs the instant question and authorizes the crediting of the proceeds of the sale of the automobile herein involved to the Southwest Missouri State Teachers College.

CONCLUSION

It is, therefore, the opinion of this department that you are within your rights in requesting that the proceeds from the sale of a car used by the Southwest Missouri State Teachers College and purchased out of the Southwest Missouri State Teachers College fund be placed in the State Treasury to the credit of the Southwest Missouri State Teachers College fund.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

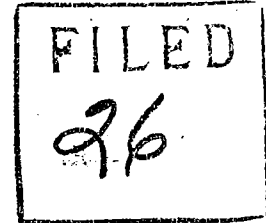
APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

MAGISTRATES: (1) Magistrate may not require fee for solemnization of marriages; (2) Magistrate cannot be compelled to solemnize marriages.

December 31, 1946



Honorable Walter A. Eggers
Judge of the Probate Court
Perry County
Perryville, Missouri

Dear Sir:

We are in receipt of your letter of December 10, 1946, requesting an opinion from this department, which reads as follows:

"SB 280 authorizes Magistrates to solemnize marriages. Two questions now arise in the minds of all magistrates-elect;

"1. Can a fee be collected for the solemnization of marriages and if so, can the magistrate retain this fee?

"2. Is it compulsory for the Magistrate to perform this function or may he refuse to perform marriages?"

The first question arises as a result of a provision in the old justice of the peace law. Section 13400, R.S. Mo. 1939, allowed justices of the peace fees for solemnizing marriage ceremonies. This section was repealed by Senate Bill 334 of the 63rd General Assembly. Section 17 of Senate Bill 207 of the 63rd General Assembly provides for the payment by the state of certain salaries to the magistrate. Then Section 3 of said Senate Bill 207, implementing Section 24 of Article V of the 1945 Constitution, limits further compensation as follows:

"Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years shall be eligible to the office of magistrate without being licensed to practice law. No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

This section in prohibiting magistrates from receiving any other or additional compensation for any other public service, seems to have reference only to the provisions of Senate Bill 207. In other words, a magistrate can only be paid for the duties and services as are set out in that bill and then only a specified amount.

Senate Bill 280 of the 63rd General Assembly gives the magistrates authority to solemnize marriage ceremonies but does not provide compensation for this service, so there is no conflict between these two bills. Now, to determine the type of service required in solemnizing marriage ceremonies, we must look to the case of *St. Louis v. Sommers*, 148 Mo. 398, 1. c. 401:

"The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be performed anywhere within his jurisdiction, at any and all hours of the night or on Sunday and there is nothing which requires the clerk to attend the justice in his perambulations or to take ex officio notice when parties will call upon the

justice at his home to perform the marriage ceremony nor does it require the justice to report such ceremony to his absent clerk.

"The statute does not give the twenty-five hundred dollars in lieu of all other fees. It simply provides he shall receive that amount as justice of the peace for services in his court. It leaves him the other perquisites of the office."

Under this authority there is no question but that the solemnizing of marriage ceremonies is not within the judicial duties set out in Senate Bill 207, and so this function is clearly within the prohibition against compensation for any other public service.

Therefore, a magistrate cannot require payment of a fee in consideration of his services in solemnizing marriage ceremonies.

The answer to the second question submitted here depends on the construction of Senate Bill 280, supra, which provides:

"Section 1. That Section 3363 of Chapter 20, Revised Statutes of Missouri, 1939, relating to who may solemnize marriages, be and the same is hereby repealed and a new section enacted in lieu thereof relating to the same subject and to be known as Section 3363, and to be as follows:

Section 3363. Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

The word "may" is important for our purpose. Should this word be construed to be permissive or compulsory? The wording of this bill is, for this purpose, the same as that in Section 3363 of the old justice of the peace law, and under the provision of that law a justice of the peace was not compelled to solemnize marriage ceremonies against his will. This was true because this service was not considered a judicial duty compulsory in its nature, 148 Mo. 398, supra. It is reasonable then to assume that when this law was re-enacted in Senate Bill 280, the same construction was intended.

Viewing this subject from the standpoint of all the officials authorized to perform this service, it seems that all should be on the same level. There is no provision compelling a minister of the Gospel to solemnize a marriage ceremony against his conscience or better judgment, and likewise this should hold true in regard to magistrates. As a general rule the word "may" when used in a statute is permissive and is given its ordinary meaning. The case of *Lansdown v. Faris*, 66 F.(2d) 929, at page 941, set out the rule as follows:

"* * * It will be noted that all through the above quotations the action of the court is governed by 'may.' This word, in ordinary meaning, carries no thought of compulsion-- it is permissive or power giving and not at all compelling, discretionary, and not mandatory. *Farmers' & Merchants' Bank v. Fed. Res. Bank*, 262 U. S. 649, 662, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A.L.R. 635; *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 588, 24 S. Ct. 767, 48 L. Ed. 1124. While this ordinary meaning will be given to that word 'unless it would manifestly defeat the object of the provisions' of the statute (*United States v. Thoman*, 156 U. S. 353, 359, 15 S. Ct. 378, 380, 39 L. Ed. 450; *Thompson v. Lessee of Carroll*, 22 How. 422, 434, 16 L. Ed. 387), such words sometimes are construed as mandatory where the clear intention of the legislative body requires such meaning (*Farmers' Bank v. Fed. Res. Bank*, 262

U. S. 649, 662, 43 S. Ct. 651, 67
L. Ed. 1157, 30 A. L. R. 635; United
States v. Thoman, 156 U. S. 353, 359,
15 S. Ct. 378, 39 L. Ed. 450). * * *"

This case says that such words are construed as mandatory only where the clear intention of the Legislature is to that effect. There is no such intention here, because the duty to solemnize marriage ceremonies is not set out in Senate Bill 207 with the general duties and functions of magistrates, and further, there is no provision, in fact there is a prohibition, for compensation or fees for this service in either Senate Bill 207 or Senate Bill 280. Had the Legislature intended for magistrates to be compelled to perform this service, surely it would have been included in Senate Bill 207 as a duty or function of the magistrate court and a provision made for adequate compensation.

Conclusion

Therefore, it is the opinion of this department that a magistrate cannot require payment of a fee in consideration of his service in the solemnization of marriages. It is further the opinion of this department that a magistrate cannot be compelled to solemnize marriages.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:EG

New Con. Sec 25
Art V PROBATE JUDGES: Probate Judge shall be licensed to practice law in this state, except that probate judges in office at the time of the adoption of the Constitution of 1945, may succeed themselves without being so licensed.

January 2, 1946.

1-11-46
FILED
27

Honorable Melvin Englehart
Prosecuting Attorney
Fredericktown, Missouri

Dear Sir:

Receipt of your recent request regarding Section 25, Article V, Constitution of Missouri, 1945, is hereby acknowledged, which reads as follows:

"According to the above described Section of the Constitution, it is provided that 'Probate Judges shall be at least 25 years and Magistrates at least 22 years of age. Every judge and Magistrate shall be licensed to practice law in this State, except that Probate Judges now in office may succeed themselves as Probate Judges without being so licensed.'

"Under the above provision is a person who formerly held the office of Probate Judge but is now not in office eligible to hold the office of Probate Judge in a County under 12,000 population?"

Section 25, Article V, Constitution of Missouri, 1945, reads in its entirety as follows:

"Judges of the supreme court and courts of appeals shall have been citizens of the United States for at least fifteen years, and qualified voters of this state for nine years next preceding their selection. Such judges shall be at least thirty years of age but shall not continue to hold office after attaining seventy five years of age. Judges of the court of appeals

shall be residents of the district of their court. Circuit judges shall have been citizens of the United States for at least ten years, and qualified voters of this state three years next preceding their selection, and be not less than thirty years of age and residents of the circuit. Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed." (Underscoring ours.)

It is a well known rule of constitutional construction that "the expression of one thing is the exclusion of another," which rule is found most recently in the case of *State v. Smith*, 111 S. W. (2d) 513, 1. c. 514.

By expressing the general proposition that every judge and magistrate shall be licensed to practice law in this state the framers of the Constitution have excluded those who are not so licensed. Exception is made with regard to those probate judges who are now in office so that they may succeed themselves as probate judges without being so licensed. Certainly if one is not in office he may not succeed himself as is stipulated in this provision.

We note that in the sentence subsequent to the one we are here considering, provision is made with regard to those who are now justices of the peace, "or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed." However, no such provision is made regarding probate judges. If it had been the intention of the framers of the Constitution that former probate judges who are not licensed to practice law in this state should be able to hold the office of probate judge again they would have provided similarly for that occasion.

Hon. Melvin Englehart - 3

The present Constitution was adopted February 27, 1945, and unless a probate judge was in office on that date he must, in order to hold office of probate judge after that time, be licensed to practice law in this state.

Conclusion

It is, therefore, the opinion of this department that under Section 25, Article V, Constitution of Missouri, 1945, a probate judge must be licensed to practice law in this state, except that those probate judges who were in office at the time of the adoption of the present Constitution may succeed themselves as probate judge without being so licensed. A person otherwise qualified, who formerly held the office of probate judge but who is not licensed to practice law in this state and who was not in office at the time of the adoption of the new Constitution, is not eligible to hold the office of probate judge.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

TAXATION AND REVENUE: Liability for tax of property exempt therefrom on date of assessment.

March 11, 1946

FILED

27

4-2

Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an opinion of this office, and reading as follows:

"I would be pleased to have your opinion as to the validity of the assessment on the following statement of facts:

"On November 24, 1944, the Baptist Church transferred a residence in Paris, Missouri, to a private owner. This property, being in the name of the Church, had been held exempt from taxation during the ownership of the Church. The Monroe County Board of Equalization placed the property on the assessment books of the county in May, 1945, as of June 1, 1944, for taxes of 1945, but later cancelled the assessment on the advice of the Prosecuting Attorney, who held it was 'an erroneous assessment'. The city assessor of Paris copied the assessment as made by the county, but has not cancelled it as the county has done.

"This Commission has advised the city that their assessment is erroneous, but they do not seem entirely satisfied and have asked me to get the opinion of the Attorney General."

It is a primary rule that taxes cannot be lawfully imposed in the absence of a valid assessment. We quote from State ex rel. v. Kansas City Power & Light Co., 145 S. W. (2d) 116, 1. c. 120:

"It is conceded that under our system of taxation there can be no lawful collection of a tax until there is a lawful assessment and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose. See State ex rel. Union Electric Light & Power Co. v. Baker et al., 316 Mo. 853, 293 S. W. 399, (cited by both sides.) This principle is well settled and needs no further citation of authorities."

Also, to the same effect, see State ex rel. v. Smith, 111 S. W. (2d) 513, and State ex rel. v. Lesser, 141 S. W. 888.

We think it then becomes pertinent to determine whether or not a valid assessment might have been made of the property as of June 1, 1944. We direct your attention to Section 10940, R. S. Mo. 1939, reading as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Also, to a portion of Section 10950, R. S. Mo. 1939, relating to the contents of assessment lists, which reads as follows:

" * * * Such lists shall contain: first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the contrary notwithstanding; * * * "

Hon. Clarence Evans - 3

From these two sections, it becomes apparent that June first of any calendar year is the date upon which assessments of real property are to be made.

We do not find any cases reported from the appellate courts directly holding that the transfer of exempt real property subsequent to the date upon which such real property is to be assessed has the effect of subjecting the property to taxation for the current year, but, by analogy, we do believe that such deduction must necessarily be drawn. In this regard, we direct your attention to a portion of Section 10941, R. S. Mo. 1939, which reads as follows:

"Government lands entered or located on prior to the first day of June shall be taxable for that year and every year thereafter; school and swamp lands and lots shall become taxable whenever the county sells, conveys or agrees to convey its title * * * "

This statute, to us, indicates an intent on the part of the Legislature that property exempt from taxation on June first of any year shall not be subjected to taxation until the year following.

CONCLUSION

In the premises, we are of the opinion that if such real property was exempt from taxation on June 1, 1944, neither the county assessor nor the county board of equalization had authority to add such real property to the assessment lists and tax rolls, under the conditions set out in your letter.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Corporation continuing to exercise corporate privileges after the beginning of current taxable year liable for tax.

FILED

27

June 4, 1946

6/14

Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"We would appreciate an opinion on the following matter:

'A corporation operating in Missouri goes into voluntary dissolution on April 6, 1946. Is said corporation liable for the corporation franchise tax for the current year?'

* * * * *

"However, the new franchise bill No. 540 apparently changes the date of assessment by the State Tax Commission from March 20 as in the old law; to November 1 in the new law.

"We would appreciate an early reply, inasmuch as the returns for this year are practically all in and we have run in to a number of dissolution cases."

May we say at the outset that the General Corporation Code of Missouri was completely revised by an Act of the 62nd General Assembly, appearing in the Laws of Missouri, 1943, at pages 457 to 482, inclusive. In this enactment section numbers were not accorded the new statutes similar to those ap-

pearing in the Revised Statutes of 1939 and we have in this opinion adopted the numbering thereof as found in the Missouri Revised Statutes Annotated.

Section 4997.135 imposes a franchise tax on all corporations organized under or subject to the general corporation laws of the State of Missouri, and upon every foreign corporation engaged in business in Missouri, whether under a certificate of authority issued by the State of Missouri or not. The tax is imposed in these terms:

"For the taxable year of 1943 and thereafter every corporation of this state organized under or subject to this act or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri * * *"
(emphasis ours.)

With respect to foreign corporations, the applicable provision reads:

" * * * Every foreign corporation engaged in business in this state whether under a certificate of authority issued under this act or not, shall pay an annual franchise tax to the state of Missouri * * *"
(emphasis ours.)

Under the provisions of section 4997.136, a report is required from every corporation liable to the tax imposed under the statute mentioned supra, to be made on or before the first day of March in each year. Said section reads, in part, as follows:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equalization annually on or before the first day of March in such form as said Commission or said Board of Equalization may prescribe. * * *"

Section 4997.137, as it appeared in the Laws of Missouri, 1943, required the State Tax Commission, from the facts reported and from any other facts within or coming to its knowl-

edge, to determine the amount of tax due by such corporation on or before the 20th day of March in each year. It is this section which has been repealed by House Bill No. 540 of the 63rd General Assembly. The statute, which appears as Section 137 of the bill mentioned, reenacts Section 4997.137 in its entirety, with the exception of changing the date upon which such tax is to be determined from the 20th day of March to the 1st day of November in each year. It also imposes the duties previously discharged by the State Treasurer upon the Director of Revenue. Section 4997.137, as amended by House Bill No. 540, reads as follows:

"The State Tax Commission shall, on or before the first day of November in each year, determine from the facts reported, and from any facts within or coming to its knowledge the proportion of the outstanding shares and surplus of each corporation employed in business in this state and the amount of tax each corporation is liable to pay under the provisions of this act and shall report the same to the Director of Revenue, who shall make out a tax bill therefor against each corporation and shall notify the proper officials of each corporation of the amount of tax due. The taxes provided for in this article shall be paid on or before the 31st day of December in each year. The Director of Revenue shall deliver a receipt for taxes paid which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this act for the year ending the 31st day of December." (Emphasis ours.)

This corresponds with the statute as it previously appeared except for the change mentioned transferring the duty to issue the receipt from the State Treasurer to the Director of Revenue.

From the above, we think it quite clear that the tax imposed is upon an annual basis corresponding to the calendar year. This is further borne out by the fact that in the annual report required of corporations under Section 4997.136, Item 10 requires that the report disclose the amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.

With these factors in mind, your question resolves itself into this: Does a corporation, by continuing the exer-

cise of any of its corporate franchises or privileges into the current taxable year, become liable for the payment of the annual franchise tax, even though such activities are terminated prior to the date when the determination of the tax is to be made by the State Tax Commission?

We think the question must be answered in the affirmative. It has been uniformly held that the very nature of a corporation franchise tax is the exaction by the sovereign state granting the right to exercise corporate privileges of a payment therefor. It is only because the corporate privileges are exercised that the tax may be validly imposed. It has been equally as uniformly held that a corporation does not become liable for the payment of franchise taxes in taxable years during which none of the corporate privileges are exercised. We think the converse to be true with equal force.

While the precise question has not been passed upon by an appellate court of the State of Missouri, yet a similar question, and one involving an almost identical set of facts, has been decided by the Circuit Court of Appeals, 6th Circuit, in the case of *Bates v. Archer*, State Treasurer of Ohio, 288 Fed. 182. In that case the court had for determination the question of whether or not a corporation exercising its corporate privileges in the State of Ohio in a portion of the tax year prescribed under the applicable Ohio statutes was subject to payment of the corporation franchise tax imposed thereunder. The Ohio statutes required such corporations to file with the Tax Commission during the month of May of each year a report from which the Tax Commission was empowered to determine the basis for the computation of the tax. Such basis was then certified to the Auditor of the state on the first Monday in August. The Auditor thereafter determined the tax due upon the basis certified to him, and the tax was payable to the Treasurer of the state on or before the first day of the following October. The facts in the case then under consideration disclosed that the corporation had gone into bankruptcy on June 21, 1921. The contention was made by the receiver that inasmuch as the corporation was not in existence on the date when the assessment was to be made, no tax could lawfully be imposed. However, there was no dispute but that for a period of the then taxable year the corporate privileges had been exercised. In disposing of this contention, the court said:

"The corporation franchise tax imposed by the Ohio statute is an annual tax for the right and privilege of exercising a corporate franchise within the state for the cur-

rent year for which such tax is imposed. The taxing period is the year, and not any part thereof. The tax is not severable, but is levied as a unit, regardless of the possibility that the franchise may be exercised for only a portion of the year. Whether this current tax year is for the calendar year, or for the year commencing on the 1st day of the month on which the report is required to be filed, is wholly unimportant in this case. In either event, the tax attached while the corporation was exercising its corporate franchise.

"The question as to when this current tax year begins being one primarily for the Supreme Court of Ohio, and wholly unnecessary to the disposition of this case, this court expresses no opinion in reference thereto. This corporation became liable for the payment of this franchise tax when it exercised its corporate franchise in any part of the tax year, although the amount of that tax was not ascertained and charged by the auditor of state until after the corporation was adjudged bankrupt."

We think that a similar result would be reached in Missouri. While the Federal Court in the case of *Bates v. Archer*, cited supra, was construing the Ohio corporation franchise tax statutes in relation to the rights conferred thereunder on the State of Ohio to collect such tax in a bankruptcy proceeding, yet we feel that the result reached therein would be strongly persuasive in determining a similar question in Missouri. That the General Assembly placed such construction upon this statute, which action is entitled to some weight in interpreting the same, under the authority of *State ex rel. v. Baker*, 9 S. W. (2d) 539, is indicated by the enactment of Section 5113, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, page 406. In the amendment the following proviso was added:

"* * * Provided, that no tax shall be imposed on corporations organized under the laws of this state on or after January 1, in any year, or on foreign corporations that commence business in this state on or after January 1, in any year, for the year in which said domestic corporations were organized, or the year in which said for-

Hon. Clarence Evans - 6

eight corporations commenced business in
this state: " * * * "

This, to us, is clearly indicative of a construction being placed upon the taxing statute which would have required such corporations to pay a franchise tax for the portion of the year in which they engaged in business, were it not for the exemption granted.

We have reviewed a prior opinion of this office delivered under date of October 20, 1941, to the Honorable Jesse A. Mitchell, Chairman, State Tax Commission, Jefferson City, Missouri, wherein a contrary conclusion was reached to that arrived at in this opinion. We believe such prior opinion to be erroneous, and it is hereby overruled and withdrawn.

CONCLUSION

In the premises, we are of the opinion that a corporation continuing to exercise any of its corporate franchises and privileges in the State of Missouri subsequent to the inception of the current taxable year is liable for the Missouri corporation franchise tax, without regard to the date when the exercise of such corporate franchises and privileges be terminated.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

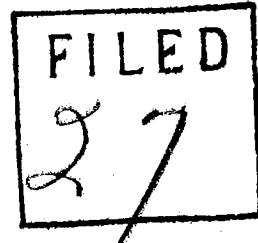
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

JUSTICE OF THE PEACE: Power to issue a warrant.

July 12, 1946



Honorable C. E. Ernst
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Mr. Ernst:

We are in receipt of your letter of July 8, 1946, asking for an official opinion, and reading as follows:

"The question has been raised in this county as to whether or not since the first day of July a Justice of the Peace has jurisdiction to issue a warrant for a preliminary hearing on a complaint filed in his Court charging a defendant with a felony. If you can advise me on this at your early convenience it will be appreciated."

Section 3857, R. S. Mo. 1939, provides as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

This statute, unless repealed, gives power to a justice of the peace to issue a warrant in a proper case.

Section 4 of the Schedule of the Constitution of Missouri of 1945 provides as follows:

"All courts of common pleas now existing, the St. Louis courts of criminal correction, and all circuit court circuits as now established, shall continue until changed or abolished by law. The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

Section 2 of the Schedule of the Missouri Constitution provides as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Senate Bill 194, relating to the repeal of Sections 2522 to 2811, R. S. Mo. 1939, inclusive, does not affect the office of justice of the peace as it now exists, nor does it affect the jurisdiction of the justice of the peace court, as the bill specifically provides that Sections 2522 to 2811 shall not be repealed before January 1, 1947, or before the expiration of the terms of office of justices of the peace in counties in which their terms of office expire after January 1, 1947.

In Section 3791, R. S. Mo. 1939, it is provided that among those who shall have power and jurisdiction to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail, are justices of the peace.

There have been no bills passed in this Legislature which in any way restrict the powers and duties of justices of the peace under Sections 3791 and 3857, R. S. Mo. 1939. Since it is provided in the Schedule of the Constitution that

Honorable C. E. Ernst - 3

justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, and since there has been no law enacted which repeals Sections 3791 and 3857, R. S. Mo. 1939, under Section 2 of the Schedule of the present Constitution, such sections are still in effect.

CONCLUSION

A justice of the peace, at the present time, has jurisdiction to issue a warrant for a preliminary hearing when a complaint is filed in his court charging a person with a felony.

Respectfully submitted,

C. D. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

TAXATION AND REVENUE: Liability of corporation to file annual statement with State Tax Commission.

July 23, 1946

FILED

27

Hon. Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

8/2

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Will you please give us an official opinion in the following matter relative to Corporation Franchise Tax?

"The Commercial Gandy Company, on 561 Grand Avenue, Kansas City, Missouri, organized under the laws of the State of Missouri has filed their Corporation Franchise Tax Report for 1946 with the Commission and claim that under Section 144, Laws of Missouri, 1943, they are not required to furnish us with a balance sheet showing amount of their assets.

"They claim that under Section 144, Laws of Missouri, 1943, they are only required to pay the Franchise Tax on their capital and surplus as shown by their report."

Section 144, referred to in your letter, appears in an Act found in Laws of Missouri, 1943, pages 410 to 491, inclusive, and reads as follows:

"All insurance companies, building and loan associations, and other corporations, the fees of which are fixed at lump sums by this Act, and all corporations which employ all their property and all their outstanding shares in this state, or which will report and pay the fees on all of its outstanding shares, whether

employed in this state or not, shall not be required to set out in the report required by this Act the value of its property within this state or without the state."

The report referred to in the above quoted section is required under the provisions of Section 136 of the same Act, which, as amended by House Bill No. 540 of the 63rd General Assembly, reads as follows:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the State Tax Commission annually on or before the first day of March in such form as said Commission may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

- "1. Name of corporation.
- "2. The location of its registered office in this State.
- "3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and post office address of each.
- "4. The amount of authorized shares.
- "5. The amount of shares subscribed.
- "6. The amount of shares issued and outstanding.
- "7. The amount of shares paid up.
- "8. The par value of the shares with par value.
- "9. The market value of the shares.
- "10. The amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.
- "11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
- "12. The market value of its property and assets in this state.

- "13. The market value of its property and assets without this state.
- "14. The market value of its total property and assets.
- "15. The amount of liabilities.
- "16. The change or changes, if any, in the above particulars made since the last annual report."

Upon reading Section 144, supra, carefully, it becomes apparent that three types of corporations are relieved from reporting the value of their property within this state or without this state. The three classifications so provided are as follows:

- (1) Corporations which pay a lump sum in lieu of the corporation franchise tax, computed upon the basis of one-twentieth of one per cent of the par value of their outstanding shares and surplus.
- (2) Corporations which employ all their property and all their outstanding shares in this state.
- (3) Corporations which will return for corporation tax computation all of their outstanding shares, without regard to whether or not they are employed wholly within this state.

You will note that such corporations are only relieved from setting out in their report the division of the value of their property as between its location within this state or without this state. They are in no event relieved from setting out in the report, under Items 14 and 15 of Section 136, quoted supra, the market value of their total property and assets and the amount of their liabilities. The reason for the retention of the requirement that the report, in any event, set forth the information required by Items 14 and 15 appears when the provisions of Section 135, found in Laws of Missouri, 1943, page 475, are considered.

From the name of the corporation with which your request deals, we take it that such corporation is not one of those included within group (1) above. It, therefore, necessarily falls within either group (2) or group (3), dependent upon

whether it employs all of its property and outstanding shares in this state or has elected to pay the tax computed upon all of its outstanding shares, whether employed in this state or not. In either event, the tax will be computed under the provisions of Section 135, mentioned supra, which reads, in part, as follows:

" * * * every corporation of this state
* * * shall * * * pay an annual franchise
tax to the State of Missouri equal to one-
twentieth or one per cent of the par value
of its outstanding shares and surplus, or
if the outstanding shares of such corpora-
tion or any part thereof consist of shares
without par value, then, in that event, for
the purpose herein contained such shares
shall be considered as having a value of
\$5.00 per share unless the actual value of
such shares should exceed \$5.00 per share,
in which case the tax shall be levied and
collected on the actual value and the sur-
plus. * * * "

We think the underscored portion of the section quoted offers the reason for the retention of the requirement that the corporation report the clear market value of its total property and assets and the amount of its liabilities. Without this information, it would be impossible for the State Tax Commission to compute the annual franchise tax due by the corporation, as no basis would exist for the determination of whether or not the value of its shares was lesser or greater than \$5.00 per share.

CONCLUSION

In the premises, we are of the opinion that a corporation must set forth in its report to the State Tax Commission for the purpose of computing the annual franchise tax of such corporation, the information required under section 136 of House Bill No. 540 of the 63rd General Assembly, with the exception of the items designated in such section as Nos. 12 and 13, even though such corporation be within the purview of

Hon. Clarence Evans - 5

Section 144 of an Act found in Laws of Missouri, 1943, pages 410 to 491, inclusive, either by act of law or by the election of such corporation.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

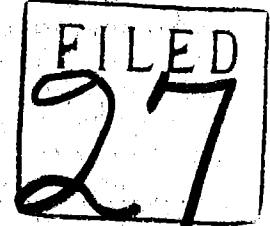
WFB:HR

SCHOOLS: Directors irregularly elected are de facto directors and if they refuse to serve, the County Superintendent may appoint directors in their place.

September 3, 1946

(Filed: #27)

Hon. Albert S. Egan
Prosecuting Attorney
Festus, Missouri



Dear Sir:

We have your letter of recent date which reads as follows:

"May I have the opinion of your office at the earliest date possible in reference to the following situation.

Notices were given and a meeting called according to the requirements of the Statutes to vote on the establishment of a consolidated rural school district in this County. The vote was duly taken and resulted in thirty-nine (39) votes for a consolidated district and ten (10) votes against. This was done in the manner required by the Statutes. However, when they proceeded to the election of directors, they elected five (5) directors, one at a time, by the method of show of hands or voice vote. When they came to the election of the sixth director he said he didn't believe that was a legal way of electing directors and if they wanted to elect him director they would have to do so by ballot. They then proceeded to ballot in his case and he was duly elected as a director. All the directors were sworn in and have been functioning as a board since sometime in June.

It seems that some opponents to the consolidation are threatening to contest the election of the directors and consolidation of the districts. Superintendent of Schools asked me for an opinion.

There is no question but what the district was consolidated legally and will stand up. Of course, only one director was legally elected. However after the election of the directors one

director, not legally elected, resigned and the board proceeded to elect a director in his place.

One question is whether this director has been legally chosen. In view of the fact that the directors were acting as de facto. I am inclined to think this director is also a legally chosen director. The question now is whether the County Superintendent of Schools should appoint these directors upon the resignation of those who were not legally elected or whether he should call another meeting of the school districts involved to elect the required directors.

The Statute provides that the County Superintendent shall call for the election to determine whether the districts shall be consolidated but says nothing about electing directors so far as the call is concerned, but in another section provides that the second procedure if the consolidation is voted shall be the election six directors.

I am of the opinion that the County Superintendent will have to appoint these directors as there doesn't seem to be any provision for him calling a meeting for their election.

Since it appears likely that this case will get into the Courts we would like to have the opinion of your office as to whether these directors who have been acting de facto, and all of whom are willing to resign, should be replaced by the County Superintendent or if he must call another election.

We think you are correct in your opinion that if the consolidation proceedings were regular they would not be rendered invalid by reason of the fact that directors were elected in an irregular manner at the same meeting. The case of State Ex Rel vs. Foxworthy, 301 Mo. 376, 256 S. W. 486, was a case almost parallel to the situation you describe in your letter. In that case the consolidation had been voted and then the voters elected the directors by a voice vote. In discussing the effect of the irregularity in electing directors, the Court said:

"That language implies that before the directors are to be elected organization has been completed and the result announced in a manner which must be followed in the second order of business.

It would defeat the will of the people to hold that the district was not organized because of an irregularity in the election of directors which the voters thought was regular. Every one present, including the clerk of the meeting, who recorded and transcribed the record of the proceeding, thought the directors were regularly elected. Those so elected proceeded to organize the board and to conduct the affairs of the consolidated district for nearly two years before any question was raised. We hold, therefore, that the consolidated district was organized when the vote to organize was cast and counted.

The directors thus irregularly elected afterwards met in due form, without objection, proceeded to organize as a board and to conduct the business of the district, and, so far as this record shows, for nearly two years acted without objection. They were de facto officers, and their acts were valid until they were ousted. They could, in the regular way, elect directors to fill a vacancy in the board the same as if they themselves had been legally elected. 23 R. C. L. p. 586, P. 317. Each of the four directors held by the court to be legally in office was elected either at an annual election by the de facto board of directors or at some regular meeting, in accordance with the statute."

Under the above authority it will be seen that the irregularity in electing directors at a consolidation meeting will not affect the validity of the consolidation proceedings. If the consolidation proceedings were regular in the case you mentioned in your letter, then the consolidated district is validly in existence even though the directors were thereafter elected in an irregular manner.

Under the foregoing case, it is also settled that directors elected as set forth in your letter are de facto directors and their acts are valid until they are ousted. Likewise, the one director who was elected by the acting board to take the place of one who had been irregularly elected in the consolidation meeting is a de facto director. The language in the Foxworthy case might indicate that the last mentioned director is a de jure director, but in the case of State Ex Rel vs. Harper, 336 Mo. 717, 80 S. W. 2d, 849, the Court in quo warranto proceeding held that a director appointed by other directors

who had not been legally elected was not legally a director. In that case the Court said, 80 S. W. 2d, 1,0. 852:

"The appellant Wesley Harper claims to have been appointed a director by the so-called 'Harwood board' on May 5, 1934, to fill an alleged vacancy in the board. But as this so-called board never had more than one legally qualified school director, it is clear that the purported appointment of Mr. Harper was a mere nullity."

The holding in the Harper case is not inconsistent with the holding in the Foxworthy case because in the Harper case the Court was considering a direct attack upon the title of the directors in a quo warranto proceeding. Absent such a direct attack we think directors irregularly elected would be de facto directors and their actions valid.

From all of the above, we are of the opinion that all of the four directors of the consolidated district you mention who were elected by voice vote and the one who was elected by the acting board to fill a vacancy are de facto directors and their acts will be valid until they are ousted by a legal proceeding. (However, such directors can be ousted in a proper proceeding.) As pointed out in the Foxworthy case, supra, the law plainly requires directors to be elected by ballot. There is no question from your letter but that only one of the directors in your case was so elected.

Section 10493, R. S. Mo. 1939, after providing for the organization of a consolidated district provides that "all the laws applicable to the organization and government of town and city school districts as provided in Article 5, chapter 72, R. S. 1939, shall be applicable to districts organized under the provisions of Sections 10493 to 10500, inclusive."

Section 10468 R. S. Mo. 1939 reads as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term."

Section 10423 R. S. Mo. 1939 reads as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 10421, and shall serve until the next annual school meeting."

As pointed out above, there is really only one legally elected director now on the board; and under the authority of the Harper case, supra, we do not believe that that board would legally fill vacancies even though all of the other directors resign. Furthermore, there might be a question as to whether a purported director can resign from an office to which he has never been legally elected. It will be noticed that under Section 10423, supra, vacancies may be created by "refusal to serve" by the directors. If there are more than one of such vacancies at any one time, the County Superintendent has the authority and duty, upon being notified of such vacancies in writing, to fill same by appointment. Therefore, if the five de facto directors in question should simultaneously file with the County Superintendent their written refusal to serve as directors, we think the County Superintendent would be authorized to appoint five directors to take the places of those refusing to serve. We would suggest that the refusal be worded substantially as follows:

Due to the question existing as to the legality of our election as Directors of Consolidated District _____ of Jefferson County, Missouri, we, the undersigned, refuse to serve further as directors of such district.

CONCLUSION

It is, therefore, the opinion of this department:
(1) that directors chosen in an irregular manner at a consolidation meeting of school districts but who qualify

and serve as such directors are de facto directors and their acts are valid until they are ousted from office; and (2) that if more than one of such de facto directors simultaneously file with the County Superintendent their written refusal to act as directors of such district, the County Superintendent can appoint directors to take the places of those refusing to serve.

Yours very truly,

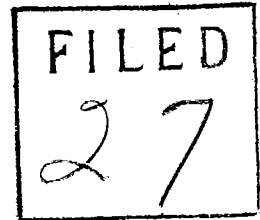
Harry A. Lay
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

TAXATION:

The mode of assessing gas companies for tax purposes.



October 14, 1946

Honorable Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit to this department a request for an opinion which reads as follows:

"For many years it has been the recognized practice for the Assessor of the City of St. Louis to assess all the property of the Laclede Gas Light Company. Now, however, the Laclede Gas Light Company, through their Vice President, Robert W. Otto, has filed a statement with the Missouri State Tax Commission in which he claims that, under the law, it is the duty of the Missouri State Tax Commission to assess the distributable property owned by gas companies. We would be greatly pleased if you will give us your opinion as to whether the Assessor of the City of St. Louis should continue to assess all this property, or whether, as the Laclede Gas Light Company contends, it should be assessed by the Missouri State Tax Commission.

"For your convenience, we are attaching herewith letter of Mr. Otto, in which he cites several reasons why the State Tax Commission should assess the property. Among other citations he quotes sub-section 12 of section 15 of House Bill 528, which was enacted by the 63rd General Assembly."

The question propounded involves the mode of assessment of the Laclede Gas Light Company of St. Louis. We have examined the memorandum submitted by the gas company to your department and which was sent by you to this department. It appears from this memorandum that the gas company is of the opinion that the tax on its plant in St. Louis should be assessed by the State Tax Commission. To support its contention, it relies principally upon the provisions of

sub-section 12 of section 15 of House Bill 528, enacted by the 63rd General Assembly and signed by the Governor on December 19, 1945. This sub-section reads as follows:

"The Commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms.* * *

In the memorandum submitted by the gas company, the case of State ex rel. Koeln v. Lesser, 141 S.W. 228, 239, is cited because it lays down a principle on the authority of taxing authorities to assess and collect taxes. The principle is:

"It is not left to the tax assessor or tax collector to say what property or what interests in property are to be taxed. Under our system of taxation, there can be no lawful collection of a tax until there is a lawful assessment, and there can be no lawful assessment except in the manner prescribed by law and of property designated by law for that purpose."

With this principle in mind, we will refer to various statutes authorizing assessment of properties similar to the one here under consideration. The gas company has taken the position that it comes within the classification of "other similar public utility corporations" referred to in said sub-section 12 of section 15, supra. This section does seem to indicate that the tax commission would have exclusive power of original assessment of the businesses named in that section, and the question here is, "Does the gas company come within the classification as another similar public utility corporation?" Neither the foregoing section nor section 11027 R. S. Mo. 1939, which was the source of section 15 of said House Bill 528, sets out in what manner assessments against the businesses named therein shall be made. For the purpose of ascertaining how such assessments shall be made, we must refer to H.C.S.H.B. 538 of the 63rd General Assembly, approved April 11, 1946, by which section 11295 R. S. Mo. 1939 was repealed and re-enacted in said House Bill in the following language:

"All bridges over streams dividing this State from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock

company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the State Tax Commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and State Tax Commission have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property. On or before the first day of May in the year 1946 and each year thereafter the president or other authorized officer of each such company shall furnish the State Tax Commission a statement, duly subscribed and sworn to by said president or other authorized officer, showing the full amount of all real and tangible personal property owned by each such

company on January 1st of the year in which the report is due. In case the report from any such company, as required by this section, is not received by May 1st of the year in which it is due the State Tax Commission may, at its discretion, increase by four per cent the total assessed valuation of any such company."

It will be noted by reference to this section that the General Assembly has not seen fit to include within its provisions gas companies or water companies. If they were included in this section, then we think there would be no question that the tax commission would have jurisdiction to assess them.

The Laclede Gas Company, in its memorandum to your department, cites the case of State ex rel. Buchanan County Power Company v. Baker, 9 S.W. (2d) 589, in support of its contention that all utilities are subject to assessment by the tax commission. In this opinion, 1. c. 591, Judge Cantt, speaking for the court en banc on the question of the taxability of the electric line there under consideration, said:

"If it is a public utility, the Tax Commission has authority to assess it."

On account of this statement, the Laclede Gas Company contends that any business which is a public utility is under the jurisdiction of the State Tax Commission for assessing purposes. We doubt the correctness of that assumption because we do not think all public utilities are under the jurisdiction of the State Tax Commission for tax purposes. In looking through Words and Phrases, we find a number of businesses which courts of different states have determined to be public utilities and we know that the Legislature of Missouri has not placed them under the jurisdiction of the State Tax Commission for assessment. A list of the businesses and states respectively follows: wharves, Texas; aviation fields, Nebraska; bathing pools, Texas; canal companies, Wisconsin; cemeteries owned by the city, Oklahoma; fire departments, Oklahoma; garbage disposal, Texas; golf links, Iowa; convention halls for the public, Oklahoma; ice plants owned by the city, Texas; electric plants owned by the city, Texas; navigation companies, Hawaii; public parks, Oklahoma; and public warehouses, Illinois.

In the case of Parsons v. Detroit, 15 Fed. Supp. 986, 987, a public utility is defined as:

"A public utility is a business organization which regularly supplies the public with some commodity or service."

Therefore, just because some business may be classed as a public utility, it does not necessarily mean that it would be under the jurisdiction of the State Tax Commission for assessment purposes, unless there is legislation conferring on the tax commission such jurisdiction. From an examination of the laws and cases, it seems that local authorities have been assessing properties of gas and water companies in this state. The case of State ex rel. Sedalia Water Company v. Harnsberger, Collector of Revenue, 14 S.W. (2d) 554, was before the Missouri Supreme Court, Division 2, in 1928. The question in that case was the mode of assessment of a water plant which had water mains extending throughout the city of Sedalia. In that case, the water company contended that the water mains extending throughout the city were not a part of the plant and could not be assessed as an appurtenance to the real estate upon which the plant was situated. To get a full picture of the contention of the taxing authorities in that case, we quote as follows, l. c. 556:

"* * * The respondent contends that those water mains are appurtenant to the plant because they would be useless and the plant would be useless unless the water could be pumped into the mains from the plant and constantly used by the company for the purpose of supplying the city of Sedalia with water; that the mains and the plant all consist of one system; and that the valuation placed upon the tract of land upon which the plant is located includes not only the machinery located upon the land but the water mains that lead from it. The 45 acres is described as a tract of land and no mention is made of the plant machinery or buildings upon it. The appellant contends that in the middle of the street in Sedalia are personal property and not appurtenant to the plant, and therefore it is taxable as a separate item."

In treating this subject, the court, at l. c. 557, said:

"Our statute, section 12267, defines what shall be considered real estate for the purpose of taxation to include not only the land itself but also all buildings, structures, and improvements and other permanent fixtures of whatever kind, and all other property belonging to manufactories of whatever kind, * * * and all rights and privileges belonging

or in any wise pertaining thereto, except where the same may be otherwise denominated by this chapter.' And personal property includes in its definition: 'Every tangible thing being subject to ownership, whether animate or inanimate, and not forming part or any parcel of real property as hereinbefore defined.'

"Appellant cites Mulrooney v. O'bear, 171 Mo. 813, 71 S.W. 1019. In that case the Hodiament Realty Improvement Company platted a subdivision adjoining the city of St. Louis, and, in order to make the lots salable, obtained a water supply from the city and laid a supply pipe on the road known as Maple avenue and connected with it water pipes leading to the lots, which were sold. It was held that the pipes leading to the separate lots were real estate and appurtenant to the lots on which and to which they were laid.* * *

* * * * *

"In this case the water mains in the streets of Sedalia are practically worthless considered as personal property, separated from the soil. They are 'necessary to the full enjoyment of the property.' The plant located upon the land of the relator would be absolutely worthless without the pipes and the pipes would be worthless without the plant which supplies them with water. They are appurtenant. 'An appurtenance is a thing used with and related to or dependent upon something else which is its principal.' Words and Phrases. There could be no case in which one thing is more completely dependent upon another for its value and utility than the water mains are dependent upon the plant which supplies them with water.

"The statute noted says real estate shall include 'rights and privileges pertaining to' the land and fixtures thereon. The dictionary meaning of 'pertaining' is 'to belong,' 'have connection with,' or 'be dependent upon' something. The participle 'pertaining' as used in the statute includes the relationship of an appurtenance.

It includes all rights and privileges connected with the plant situated upon the tract of land described, and must include the right to lay water mains in the street. The land was acquired and the plant established for the purpose of that service. The right to lay pipes in the street was an absolute necessity inseparably connected with the plant and inseparably connected with the water mains laid under and by virtue of that right. That right is appurtenant to that plant--pertains to it. How is it possible to separate that right from the improvement made in pursuance of it? How could one say that the right in this case belongs to and is connected with the power plant, as an appurtenance, and at the same time say that the pipes laid by virtue of that right are not connected with it? How can you separate the exercise of a privilege from the privilege itself? How can you separate the water mains laid in the street from the right to lay such mains so far as the character of the property is concerned?

"Upon both reason and authority the water mains in the streets in the city of Sedalia are appurtenant to the land upon which the plant is located, and therefore should be valued as a part of the real estate, and were so valued by the tax commission."

The same principle was applied by the Missouri Supreme Court in Division I in the case of Joplin Waterworks Company v. Jasper County et al., 58 S.W. (2d) 1068, and it was held that the water distribution system of the Joplin Waterworks Company was appurtenant to the water plant and should be taxed as a part reality upon which the waterworks plant was situated. That opinion was rendered in 1931. From a reading of these cases, it will be seen that the court based its ruling on the ways that the term "real estate" as defined in the tax statutes included property belonging to and pertaining to such real estate. The 65th General Assembly, in section 3 of sub-section B, House Bill 471, defined the term "real estate" as follows:

"Real property includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of what-

ever kind thereon, and all rights and privileges belonging or appertaining thereto."

It will be noted that this definition of the term real property includes improvements and fixtures of whatever kind may be on such real estate and rights and privileges belonging or appertaining thereto. This definition of the term real estate, used in the aforesaid section under the ruling announced in the Sedalia and Jasper County cases, would be broad enough to include water distribution lines attached to a waterworks plant. The construction and distribution of a waterworks plant and system would be similar to that of a gas plant and distribution system; that is, insofar as the application of the "appurtenant" rule would be applicable.

Section 10 of H.C.S.H.B. 469 of the 63rd General Assembly, approved December 5, 1945, requires the county assessors to assess real and tangible personal property in their counties at its true value in money. This section requires the assessor to go to the office, place of business or residence of each person required to list their real and tangible personal property. This procedure for assessment is similar to that which was followed for assessment of real estate at the time of the rendering of the opinion in the Sedalia case, supra.

The Legislature has not seen fit to change the mode of assessment of gas and water companies since the Sedalia and Joplin opinions. The law, R. S. Mo. 1939, Section 11295, including businesses which were to be assessed and taxed by the State Tax Commission as railroads were assessed, was repealed and re-enacted in H.C.S.H.B. 538 by the 63rd General Assembly. This section, as re-enacted in said House Bill, did not include gas companies or water companies as those businesses which would be taxed in the manner prescribed by said section 11295 of said House Bill 538.

Following the principle announced in the Lesser case, supra, we do not think that the statute, House Bill 538, would authorize the assessment of gas and water companies by the State Tax Commission. We think, however, that under the rulings of the Missouri Supreme Court in the cases cited in this opinion that such businesses may be taxed by the local taxing authorities under the rule that the distribution system of waterworks plants and gas plants is appurtenant to and a part of the main plant and should be taxed as a part of the reality upon which the plant is situated.

CONCLUSION

From the foregoing, it is the opinion of this department

Hon. Clarence Evans

(9)

that waterworks plants and gas plants, together with the distribution system, should be taxed by the local taxing authorities in the counties in which such plants are situated and we are further of the opinion that such plants and their distribution systems should be assessed in the county and district in which the plant is located.

Respectfully submitted,

THOMAS W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: In case of a tie vote for clerk of the county court, the sheriff of the county calls a special election at the direction of the county clerk, Withdrawal of one candidate after a tie vote cannot avoid a special election.

November 19, 1946



Honorable C. E. Ernst
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Sir:

We are in receipt of your letter of recent date, requesting an opinion of this department, and reading as follows:

"In Gentry County we have a tie in the vote for Clerk of the County Court. To me Section 11621 of Revised Statutes of 1939 is somewhat confusing and I am requesting an opinion as to whether or not the Clerk of the County Court has authority to order the Sheriff to call a special election for the election of a County clerk in case of a tie.

"In some cases of a tie in the vote it seems that the Governor is the proper authority for calling an election in case of a tie, rather than the Sheriff. The question also presents itself as to whether a special election might be legally avoided should one of the candidates withdraw; and also the question as to how much time the Clerk may have to make his order on the Sheriff to call an election in a case of this kind.

"I would also be very grateful if you would send me a form of order for the Clerk and also form of proclamation for the Sheriff."

The questions contained in your letter to be answered are:

- (1) In case of a tie vote between the candidates for clerk of the county court in counties of the third class, who is the proper officer to order the sheriff to call a special election?
- (2) If one of the candidates in the contest for county clerk where a tie vote was cast withdraws, does such withdrawal make a special election unnecessary?

Section 11621, R.S.Mo. 1939, provides as follows:

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk or justices casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him or them to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerk and justices, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

We are unable to find any other statute regarding the calling of an election when there is a tie vote for county clerk. Therefore, the provisions of Section 11621 are applicable where there is a tie vote in an election for the office of clerk of the county court. Notice of such tie vote must be given to the sheriff of the county, who issues a proclamation calling for an election.

Section 2 of Senate Bill No. 483 of the 63rd General Assembly provides as follows:

"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a

clerk of the county court, who shall be commissioned by the governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election: Provided, that the term of office of persons holding the office of clerk of the county court at the time this act shall take effect shall not be vacated or affected thereby."

"Elect" is defined in Funk & Wagnalls Dictionary of the English Language as meaning:

"To choose or designate for an office by a majority or plurality vote."

The Supreme Court of Missouri, in State ex rel. Speck v. Geiger, 65 Mo. 306, 1.c. 310, said:

" * * * * At the general election in November, 1874, the relator and one W. C. Kelley, were candidates for the office of prosecuting attorney of Texas county, and were the only persons voted for, and they each received at said election the same number of votes. * * *

"It is admitted in the record that W. C. Kelley, during the time of his candidacy, and on the day of the general election in 1874, did not live in Texas county, and that at least twelve of the qualified voters of Texas county who voted for said Kelley, knew he was not a resident of said county; but it does not appear that they knew that his non-residence rendered him ineligible. It will be unnecessary to express any opinion as to the effect of this admission, as the case can very properly be determined upon other grounds. Both parties concur in regarding the result of the regular election in November, 1874, as a failure to elect, and we will so consider it. Conceding then that there was no election of a successor to the relator in November, 1874, by reason of the fact that each of the candidates received an equal number of votes, * * * "

In this case it is clear from the quoted portions of the opinion that there was no doubt in the mind of the court that in case of an actual tie vote, and where no contest of the election was held, a special election should be held, although the court did hold in that case that the section now numbered 11621, R. S. Mo. 1939, did not apply to the office of prosecuting attorney of a county. However, the general rule laid down in that case is applicable to the facts in the present case.

It was held by the St. Louis Court of Appeals in the case of State ex rel. John Herget v. Robert Walsh, 7 Mo. App. 142, that when one candidate died several hours before the opening of the polls, and such dead person received a greater number of votes than his opponent, the opponent of the dead man could not be declared elected.

The Supreme Court of Missouri, in Sheridan v. City of St. Louis, 183 Mo. 25, held that where a candidate for the House of Delegates of the City of St. Louis who received a greater number of votes than his opponent was declared ineligible, his opponent could not thereby be declared elected.

The theory of the courts in both of these cases was that to be elected means to receive a majority or a plurality of votes.

The result of a tie vote for county clerk, then, is the same as if no election had been held. The candidates who received the same number of votes for this office are still candidates for the office of county clerk, since no one has been elected.

Since the candidates for county clerk who received the same number of votes are still candidates for that office, the withdrawal of one candidate would have no more effect at the present time than if he had withdrawn his candidacy before the election was held. If one candidate had withdrawn before the general election at which the tie vote occurred, no official, or body of officials, would have had any power to declare his opponent elected until an election was actually held.

The withdrawal, then, by a candidate of his candidacy for the office of county clerk at the present time does not authorize any official, or officials, to declare the candidate who received the same number of votes elected, or to issue such opponent a commission. It will be necessary to hold

Mr. C. E. Ernst - 5

an election to elect a county clerk of Gentry County before January 1, 1947.

The notice to the sheriff should be made at such time so that the sheriff may have a reasonable time in which to give sufficient notice in his proclamation as to the date such election will be held.

We are enclosing forms for the notice to the sheriff and for the sheriff's proclamation.

CONCLUSION

It is, therefore, the opinion of this department that an election for the office of county clerk of Gentry County should be proclaimed by the sheriff of said county when he receives official notice of the tie vote for the candidates for said office.

It is the further opinion of this department that such election must be held even though one candidate withdraws his candidacy.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

JE. TAYLOR
Attorney General

CBB:HR

CONSTITUTION OF 1945;
Magistrate Courts:

Authority of judges of circuit courts
to establish additional magistrate courts
in counties of 30,000 inhabitants or less.

April 8, 1946



Honorable Raymond L. Falzone
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

Reference is made to your request of recent date for
an official opinion of this office, reading as follows:

"Article V, Section 18, of the new Constitution apparently provides that in counties of 30,000 inhabitants or less the Circuit Court has the right to increase the number of Magistrates.

"Yet the new Magistrates law passed by the Legislature fails to provide any procedure for such increase. In other words, the Constitution provides that the number of Magistrates may be increased in any county, while the Legislature's bill says that the number may be increased in any county of 30,000 or more.

* * * * *

"What our Justices of the Peace desire to know and would like to have your opinion on is whether they have the right to petition the Circuit Court for the establishment of another Magistrate Court or two in Randolph County and whether the Court has the right to establish such additional court or courts. My own personal opinion is that they do have such right."

Article V, Section 18, of the Constitution of 1945, referred to in your letter of inquiry, reads as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law." (Emphasis ours.)

It is a primary rule of construction that the intent and purpose of a particular provision is to be ascertained and that such intent and purpose is of primary importance in determining the meaning and scope thereof. We quote from *Graves v. Purcell*, 85 S.W. (2d) 543, 337 Mo. 574:

"In determining the true meaning and scope of constitutional provisions, the intent and purpose of the lawmakers is of primary importance."

In arriving at such construction, it is necessary that the fundamental rule be adhered to that the instrument must be construed as a whole. We quote from *State v. Adkins*, 225 S.W. 981, 284 Mo. 680, 1.c. 693:

"It is a fundamental rule of construction of all writings, whether they be laws, wills, deeds, contracts or constitutions, that they must be construed as a whole, and not in detached fragments; that they must be construed to effectuate and not to destroy their plain

intent and purpose, and that in determining what is that intent and purpose all provisions relating either generally or specially to a particular topic are to be scrutinized and so interpreted, if possible, as to effectuate the intention of the makers. This rule does not need (though it does not lack) authority to give it vitality. It is inherent in the very nature of things, and springs from reason as Minerva sprang from the brain of Jove, full-grown and ready for battle."

Unless, after resorting to examination of the entire instrument, some ambiguity or uncertainty remains, no resort may be had to matters extrinsic to serve as an aid in construing the provision. We quote from State ex rel. v. Board of Curators of University of Missouri, 188 S. W. 128, 268 Mo. 598, 1. ¶. 610:

"* * * Its direct force is spent entirely upon an injunction to aid and maintain, under stated conditions, the departments already established. No 'subtlety,' no 'ingenuity of argument,' logically, can wring from the language used any other meaning. In such case we are not permitted, for the purpose of attempting to discover some hidden, some occult intent of the people, to resort to documents other than the Constitution itself. It is only in case the meaning remains in doubt after the whole instrument is examined that the court may turn to extrinsic facts for aid in interpretation. When the words used themselves permit of no doubt as to the meaning, that ends the matter. There is no room for construction." (Emphasis ours.)

Keeping these fundamental rules of construction in mind, we have examined Section 18 of Article V of the Constitution of 1945 and have reached the conclusion that the language incorporated therein relative to the appointment of additional magistrates is such that by its clear meaning the various circuit courts are authorized to create additional magistrate courts in any county, without regard to size. It is, of course, necessary that the creation of such additional magistrate courts is limited to an exercise of the judicial discretion that the needs of justice require their creation, and

further to the limitation that the maximum number so created in any county will be governed by the applicable provisions of Section 18 of Article V with respect to the population of any such county.

Even though it be considered that ambiguity exists in the provisions of Section 18 of Article V of the Constitution of 1945, so that we might be authorized to consider extrinsic matters to determine the true meaning and intent of such provisions, we believe we would reach the same result. In this regard we note that Section 18 of Article V of the Constitution of 1945 superseded Section 37 of Article VI of the Constitution of 1875, which provided for a system of justice of the peace courts in Missouri. That section, together with the implementing statutes enacted thereunder, served the purpose of providing convenient courts of limited jurisdiction easily accessible to litigants. Such courts were of a number "as the public good may require," as was said in the constitutional provision referred to. You will note a somewhat similar provision in the constitutional provision now under consideration, where the language appears as "according to the needs of justice." This, to us, indicates an intent to maintain a similar system of inferior courts.

Further, and as bearing upon the proper construction to be placed upon the constitutional provision, we have resorted to an examination of the debates of the Constitutional Convention. We have done so, well knowing that the general rule is that the reliance that may be placed upon them is somewhat limited. See *State ex rel. v. Osburn*, 147 S. W. (2d) 1065, 1. c. 1068, where, after so declaring the rule as stated, supra, the Supreme Court did in fact consider the constitutional debates referring to the Constitution of 1875 in determining the meaning to be given to certain of its provisions. A similar action was taken by the Supreme Court in the recent case of *State ex rel. Montgomery v. Nordberg*, which has not yet been reported in either the official reports or the advance sheets.

Keeping this limitation in mind, we direct your attention to a part of the debates found in the Record of the Constitutional Convention of 1944-1945 relating to the constitutional provision now under consideration, particularly at page 2819 of the transcript of the proceedings had:

MR. JOPE: It does change the number of such courts in counties of less than 30,000 inhabitants?

"MR. PHILLIPS (OF ST. LOUIS CITY): No question of that, Senator.

"MR. COPE: In counties of less than 30,000 inhabitants, how many magistrates courts do you contemplate will be set up under the provisions of this Section?

"MR. PHILLIPS: Counties less than 30,000?

"MR. COPE: Yes.

"MR. PHILLIPS: Well, as I understand it those counties that think that they can have the probate judge continue to act as probate judge and also assume the duties of magistrate can get along with no magistrate. The probate judge can do it all. If, in those counties where they think the probate judge can't do it all, they can have as many as two magistrates and the probate judge.

"MR. COPE: That is by making application?

"MR. PHILLIPS: They make application to the circuit court on petition.

"MR. COPE: Well, don't you think that that, in effect, is what would happen if the circuit judges would appoint two extra magistrates and they would both be drawing salaries?

"MR. PHILLIPS: Well, I haven't my file book before me but as I recall the language it's this 'that according to the needs of justice and the financial ability of the county the circuit court shall determine that question.'

"MR. COPE: Well, you know as a matter of practice it would be absolutely necessary for counties of less than 30,000 to have more than one magistrate court, don't you?

"MR. PHILLIPS: Well Senator, we had quite a long discussion in our sub-committee on that question, and I was the one that stood out for more magistrates on the ground that I thought I didn't know enough about the whole state of

Missouri to put in a limitation that might not be applicable to all counties, and I was the one that fought for these extra two magistrates, and we thought, the Committee thought, that we were going beyond the necessary number when we provided for an extra two."

Also, on page 2822 of the transcript of the proceedings:

"MR. ROBISON: * * * Some thought was expressed, in counties along the border line of 28, 29,000 and very probably the probate judge would not have that time. I think Mr. Moore from Grundy County made that suggestion, so we provided then that there might be additional magistrates appointed where they were needed and the financial conditions of the county were sufficient to justify it upon application to the circuit judge."

Further, on page 2842 of the transcript of the proceedings:

"MR. SHEPLEY: Senator, why do you assume that there will be three magistrates in every county in Missouri?"

"MR. COPE: As I understand it this file makes provision that the Circuit Court may make an order raising in counties of less than 30,000 raising the number to three. That is they can put on two extra. There is no provision here made here about who is going to appoint them. It's not true that under this provision the Circuit Court would appoint them, but when a petition is filed in the Circuit Court, the court will make an order putting on two extra and they must all be on salary just like the probate judge. You asked me why I assumed that it will be done. That's the only way that he could have any change of venue. We'd have to have more than one and then when it comes to casting up the election returns, the practice is for the County Clerk to call in either two judges of the County Court or two justices of the peace within five days after the election. They cast up their returns and they issue certifi-

cates of election to those officials who are elected. Now, every four years all three of the county judges, if they do have three in a county, all three of them are up for election so they would be disqualified. The only two people that could be called in would be two justices of the peace and if the magistrates are to take over all of their duty, then they would at least have to have two."

From the above quotations from the debates, it is clearly apparent that the Constitutional Convention contemplated that the circuit court would have the authority to order the establishment of the additional magistrate court districts in counties containing less than 30,000 inhabitants when "the needs of justice may require."

There is another angle to be considered in connection with the determination of your question. The power to provide for the administration of the magistrate courts was given the General Assembly under the provisions of Section 21 of Article V of the Constitution of 1945, which reads as follows:

"The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

Pursuant to this grant of power, the General Assembly has adopted Senate Bill No. 207, which we have examined. In this bill the General Assembly has purported to restrict the creation of additional magistrate courts except in counties greater in population than 30,000. Such restriction appears in the language used in lines 13, 14, 15 and 16 of Section 1, page 2, reading as follows:

" * * * According to the needs of justice, in counties of more than 30,000 inhabitants, the foregoing number of magistrates in any county may be increased by not more than two * * *." (Emphasis ours.)

While it is true that the legislative construction placed upon a constitutional provision is entitled to great weight, yet such construction must give way to self-enforcing provisions of the Constitution. The people of the state

in adopting a constitutional provision may make such provision self-executing and place it beyond the power of the General Assembly to render it nugatory. We direct your attention to State ex inf. McKittrick v. Wymore, 119 S. W. (2d) 941, 343 Mo. 98, wherein the Supreme Court quoted with approval from its prior opinion in State ex inf. Norman v. Ellis, 325 Mo. 154, 28 S. W. (2d) 363, as follows:

"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *"

We then think it pertinent to examine Section 18 of Article V from the viewpoint of determining whether or not its provisions relating to the creation of additional magistrate courts are self-executing. The rule is said to be that constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of rights created or enforcement of duties imposed. We quote from State ex inf. Norman v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154:

"The general rule is thus stated in 12 C. J., page 729: * * * 'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'"

Also, to the same effect is McGrew Coal Co. v. Mellon, 287 S. W. 450, 315 Mo. 798; certiorari denied, 47 S. Ct. 456, 273 U. S. 752, 71 L. Ed. 874, from which we quote:

"There can be no question that constitutional provisions, creating a right or imposing a duty or a liability, where none existed before, and making no provision for the passage of laws by the Legislature to enforce same, are self-enforcing."

It might be contended that the last sentence of Section 18 of Article V of the Constitution of 1945 would take the particu-

lar constitutional provision under consideration out of the rule. The last sentence reads:

"The salaries of magistrates shall be paid from the source or sources prescribed by law."

We do not believe that such effect should be given to this portion of the constitutional provision. In *McGrew Coal Co. v. Mellon*, 287 S. W. 450, 1. c. 454, the Supreme Court of Missouri cited *Bandel v. Isaac*, 13 Md. 202, in which case the Supreme Court of Maryland had under consideration a provision of the State Constitution (Art. 3, Sec. 49), which provided that not more than six per cent interest should be exacted and "the Legislature shall provide, by law, all necessary forfeitures and penalties," for the declaration that:

"The provision for legislative action was directed only to the enactment of laws to provide for forfeiture and penalties, and such direction did not require legislative action to enforce the constitutional provision as a whole."

We think that the last sentence of Section 18 of Article V is merely directory to the General Assembly to provide for salaries of the various magistrates, and that it is not an integral part of the provision relating to the creation of the additional magistrate courts. It is within the power of the people, speaking through their constitution, or of the Legislature, to create offices without providing for compensation for the officers who shall thereafter fill them. It has also been held that constitutional provisions may be self-enforcing in part and not as a whole. We quote from *State v. O'Malley*, 117 S. W. (2d) 319, wherein the Supreme Court said:

"A constitutional provision may be self-enforcing in part and not so as to another part. *State ex inf. Barker v. Duncan*, 265 Mo. 26, 41-43, 175 S. W. 940, 944, Ann. Cas. 1916D, 1. Undoubtedly, the part of the section permitting the opening of ballots in election contests is not self-enforcing, in the sense that further provision must be made by statute for such contests. But the part which provides for the use of the ballots as evidence in grand jury investigations is self-enforcing, and no legislative default can thwart it." (Emphasis ours.)

We think the entire situation is quite similar to that discussed in Railroad Co. v. State Board of Equalization, 64 Mo. 294. In the Constitution of 1875 there appeared Article X, Section 18, providing for the creation of a State Board of Equalization, naming the parties who were to comprise such board, prescribing its duties and transferring to it functions previously discharged by the State Senate. It was argued in the case cited that this provision was not self-enforcing for the reason that legislation was necessary to give it effect. The court, answering this contention, held:

"* * * that the Board of Equalization under the new Constitution became at once the only board thereafter for that purpose, and was clothed with all the powers and duties of the board for which it was substituted, and its acts are valid and obligatory."

Although your letter of inquiry does not specifically refer thereto, we deem it advisable to give some consideration to whether or not magistrates elected or appointed in additional magistrate districts created by order of the circuit court may be compensated for their services, and if so, from what source such compensation should be derived.

It is elementary that any officer claiming compensation must be able to point out a statute authorizing his compensation, for in the absence of such statute, the rendition of his official services is deemed to be gratuitous. We quote from Nodaway County v. Kidder, 129 S. W. (2d) 857:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. * * *

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. * * *"

Senate Bill No. 207 is the one prescribing the salaries to be received by all magistrates. We direct your attention particularly to Section 17 of such bill, which reads, in part, as follows:

"The salaries of all magistrates shall be paid by the state, except that the state shall

not pay the salaries of additional magistrates whose offices are created by order of the circuit court as provided for in Article V, Section 18 of the Constitution; but the districts assigned to such additional magistrates shall be designated as 'additional magistrate districts' and the salaries of such magistrates shall be paid by the county. The annual salaries of magistrates shall be as follows:

(Here follows a setting out of the salaries to be paid magistrates in the various brackets based upon population and assessed valuation as fixed by the General Assembly).
"In all counties now or hereafter containing a population of 30,000 inhabitants or less, the salary of the magistrate as above provided shall include his compensation as probate judge of said county. * * *"
(Emphasis ours.)

Were it not for the inclusion of the last sentence quoted, there could be no contention made but that the magistrates of the additional magistrate districts created by order of the circuit court in a county containing less than 30,000 inhabitants would be entitled to receive the compensation fixed for magistrates in such counties under the previous portion of the section. However, we do not believe that this sentence does have the effect of precluding such magistrates from being compensated for the discharge of their official duties.

It is a primary rule of statutory construction that the true intent and purpose of the Legislature should be ascertained, if possible, from the language used in the act itself. See *Wentz v. Price Candy Co.*, 175 S. W. (2d) 852, 352 Mo. 1. To arrive at such intent, it is proper to consider the title of an act passed by the General Assembly. We quote from *A. J. Meyer & Co. v. Unemployment Compensation Commission of Missouri*, 152 S. W. (2d) 184, 1. c. 189:

" * * * Under our Constitution the Title of a statute is necessarily a part thereof, and is to be considered in construction. * * *"

The title of Senate Bill No. 207 reads as follows:

"AN ACT to provide for the election, appointment, term of office, and the number of magis-

trates and the manner of conducting such elections; to provide for the qualifications and commissioning, and resignation of magistrates; to provide for the establishment of magistrate courts and the original jurisdiction of magistrate courts in civil cases; to provide for clerks of the magistrate courts and their duties, and the salary of magistrates and clerks of the magistrate courts which shall include his compensation as probate judge in certain counties; to provide that magistrate courts shall be courts of record; to provide for process, pleading, practice and procedure in such courts; to provide for the force and effect of judgments and executions, and for a complete procedure of trial with and without jury, and for appeal; and to provide the operative date for certain sections hereunder, with an emergency clause."

It is immediately apparent upon reading this title that no prohibition is indicated therein against the payment of the salaries of such magistrates as we have under consideration.

Another rule of construction is that effect is to be given to all parts of the statute under construction. We quote from *State ex rel. v. Mitchell*, 181 S. W. (2d) 496, 352 Mo. 1136:

"It is a further general rule that statutes are to be constructed, if possible, so as to harmonize and give effect to all their provisions. *State ex rel. Mills v. Allen*, 344 Mo. 743, 751(13), 128 S. W. 2d 1040, 1043(4). This necessarily requires that in determining the meaning of particular sections of a legislative act all other parts thereof should be consulted so far as they throw light thereon.
* * * "

With this in mind, we direct your attention to that portion of Section 17, quoted supra, which has been emphasized by underscoring. Giving effect to this portion of the act and reading into it the constitutional provision referred to therein, which has been previously quoted on page 2 of this opinion, it seems to us clear that the General Assembly intended that

the salaries provided for in Section 17 should apply to all offices created in accordance with the constitutional provision. That this was the intent is further evidenced by reason of the fact that Section 1 of Senate Bill No. 207 does not provide for the appointment of additional magistrates in counties containing less than 30,000 inhabitants, yet this portion of the act is not referred to in Section 17, but rather reference is made to the constitutional provision.

It is a further rule of statutory construction that legislative enactments will not be construed in a manner leading to absurdities. We quote from State v. Irvine, 72 S. W. (2d) 96, 335 Mo. 261:

" * * * The courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation. * * * "

Considering the effect of a construction of Senate Bill No. 207 which would deny to magistrates compensation for the discharge of their official duties, when such magistrates have been appointed or elected to serve in districts created by order of the circuit court, it becomes apparent that an unreasonable and absurd situation would be created.

From the above, we are persuaded to the view that no intent existed on the part of the General Assembly to deprive such magistrates of compensation when lawfully appointed or elected to office, and that their compensation should be paid by the county wherein they serve. This, of course, is the direct statement contained in that portion of Section 17 of Senate Bill No. 207, above quoted, wherein the following appears: " * * * the salaries of such magistrates shall be paid by the county."

CONCLUSION

In the premises, it is the opinion of this department that the circuit court of a county containing less than 30,000 inhabitants has the authority, upon petition, and upon a determination that the needs of justice require such action, to increase the number of magistrate courts in such county in a number not exceeding two.

We are further of the opinion that such magistrates so appointed or elected to serve in additional magistrate districts created by order of the circuit court are entitled to compensation for the discharge of their official duties in an amount determined in accordance with the brackets set out in Section 17 of Senate Bill No. 207, and that such salaries are to be paid by the counties wherein such additional magistrate districts are located.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:IR

INSURANCE: Deductions for insurance premiums by Commission Merchants
TRUCKERS: or truckers carrying livestock from farm to market are
illegal where the carrier falls within the jurisdiction
of the Public Service Commission, if the total charges
exceed the rate allowed by the Commission; are illegal if
the insurance is not carried whether the trucker is within
jurisdiction of the Public Service Commission or not; and
where insurance is carried may or may not be legal accord-
ing to the contract entered into between shipper and trucker.

May 14, 1946



5/18

Honorable Andrew Field
Prosecuting Attorney
Caldwell County
Hamilton, Missouri

Dear Mr. Field:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this department regarding the legality of the practice of Live Stock Commission Merchants and Packers in deducting from the proceeds of shipments of livestock a premium on an insurance policy purported to have been carried by the driver of the truck who transports a farmer's livestock to the city markets.

Your letter states that the farmers object to such deductions for the following reasons:

First, because they have no information as to whether a particular truck driver carries a policy of insurance to cover losses sustained; second, because the farmer is not advised of the insurance company in which such policy is held; and third, because the farmer has no choice in selecting the insurance company in which such policy is held.

We think the following questions are presented by your letter:

- (1) Are the deductions above referred to legal when the trucker falls under the supervision of the Public Service Commission of Missouri?
- (2) Are said deductions legal when the trucker does not fall under the jurisdiction of the Public Service Commission of Missouri, and does not actually purchase the insurance?
- (3) Are the deductions legal when the trucker does not fall under the jurisdiction of the Public Service Commission of Missouri, and such insurance is carried by the trucker?

We will consider the above questions in the order named.

Section 5720, R. S. Mo., 1939, defines the term "motor vehicle" and "motor carrier". By the provisions of Section 5723, R. S. Mo., 1939, the Public Service Commission is vested with the power to supervise and regulate every motor carrier in the state and to fix or approve rates, fares and charges of such motor carriers. Section 5721, R. S. Mo., 1939, provides that the provisions of the Public Service law shall not apply to "motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors."

Thus, the livestock truckers who are engaged only in transporting livestock from the farm to the market would not fall within the jurisdiction of the Public Service Commission.

Section 5723 (c), R. S. Mo., 1939, provides as follows:

"All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided."

Section 5611, R. S. Mo., 1939, found in the article dealing with common carriers, provides in part as follows:

"* * * No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

Rule No. 65 of General Order No. 33-B, promulgated by the Public Service Commission, provides in part as follows:

"(a) Tariffs Required. Every motor carrier, to the extent it is authorized by this Commission to engage in intrastate transportation between points in Missouri, shall publish, file and post tariff schedules containing the charges to be assessed for all common carrier services."

It will thus be seen that truckers who carry livestock from farm to market, but who also carry other goods, must file a tariff with the Public Service Commission, and the rates and charges allowed by the Public Service Commission cannot be exceeded by such carriers. Therefore, if a trucker falls within the jurisdiction of the Public Service Commission of Missouri, it would be illegal for him to deduct extra charges for insurance premiums, if these extra charges exceed the rate allowed by the Public Service Commission.

With regard to the second question raised by your letter, we refer you to Sections 4487 and 4694, R. S. Mo., 1939, which read as follows:

"Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, right in action or other valuable thing or effects whatsoever, and every person who shall, with the intent to cheat and defraud another, agree or contract with such other person, or his agent, clerk or servant, for the purchase of any goods, wares, merchandise or other property whatsoever, to be paid for upon delivery, and shall in pursuance of such intent to cheat and defraud, after obtaining possession of any such property, sell, transfer, secrete or dispose of the same before paying or satisfying the owner or his agent, clerk or servant therefor, shall upon conviction thereof be punished in the same manner and to the same extent as for feloniously stealing the money, property or thing so obtained."

"Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

We are of the opinion that a deduction withheld on the premise that insurance has been purchased by trucker would be the taking of money under false pretenses as defined in the above sections. Such withholding would be, therefore, illegal and subject to penalties provided for in the above quoted sections.

Regarding the third question presented by your letter, we are of the opinion that the legality of deductions by non-Public Service operators who actually purchase liability insurance is to be determined on a contract basis. We see no reason why the trucker could not charge the amount he desires for hauling livestock, including additional charges for insurance premiums, if the shipper is informed that such additional charges will be made. In such case, it would appear that a valid contract would exist between shipper and trucker. On the other hand, if the shipper was quoted a hauling charge by the trucker, and then the trucker attempted to charge an additional amount, the shipper would not legally be bound to pay such additional amount. In other words, the trucker would be obliged to fulfill his part of the contract entered into between the shipper and himself, and further, that the shipper would not be bound beyond the terms of said contract. This department would be unable to pass upon the legality of deductions in such cases without being advised of the specific terms of the contract entered into by the shipper and the trucker.

The first objection raised by the shipper to the practice of making these deductions for insurance premiums by livestock truckers that they do not know whether the trucker actually carries a policy of insurance is, we think, answered by the discussion above with relation to questions (1) and (2) presented by your letter. The second and third objections, we think, are matters of individual contract rights, which are dealt with by our discussion under question (3) above.

CONCLUSION

We are, therefore, of the opinion that: (1) It would be illegal for livestock truckers, who are under the jurisdiction of the Public Service Commission of Missouri, to charge more than the rate allowed under the rules and regulations of the Public Service Commission, and if the deductions for insurance premiums are inconsistent with the rules and regulations regarding this type of trucker laid down by the Public Service Commission, they could not legally be exacted from the shipper. (2) That the deductions for insurance premiums would be illegal, if any trucker failed to actually carry the insurance for which he has purported to make the deduction. (3) The legality of deductions made by truckers, who do not fall under the jurisdiction of the Public Service Commission, and who actually purchase the insurance, the premium for which is deducted, would depend upon whether the terms of the contract entered into between the shipper and the trucker included said deductions, and the deductions would be legal only to the extent that they were covered by the terms of such contract.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:LR

SCHOOLS:

COUNTY SUPERINTENDENT:

County Superintendent in Fourth Class county: (1) is entitled to his actual necessary traveling expenses; (2) can employ a clerk without the consent of the county Court; (3) can employ a teacher as clerk who performs the duties of clerk outside his teaching hours.

October 19, 1946

FILED

31

Hon. Edwin Frieze
Prosecuting Attorney
Greenfield, Missouri

Dear Sir:

We have your letter of recent date in which you submit the following questions regarding the county superintendent of schools in a county of the fourth class:

1. Upon what basis are the traveling expenses of the county superintendent calculated?
2. Can the county superintendent employ a clerk without the consent of the county court?
3. Can a teacher who is regularly teaching be employed as a clerk of the county superintendent and perform the clerical duties outside the hours he teaches?

We shall take up your questions in the order listed above.

Section 10618.5 Mo. R. S. A. 1946 (H. C. S. H. B. No. 771 L. 1945) deals with all of the above questions. We shall quote portions of said section in connection with each of the above questions.

Said Section 10618.5 reads in part as follows:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. * * * The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. * * * Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled. "

By the first sentence quoted above, the county superintendent is to be allowed not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. Said section does not allow the superintendent a set amount for his traveling expenses, but he is allowed whatever his actual and necessary traveling expenses are, not to exceed twenty-five per cent of his annual salary. He is required to present a bill to the county court setting forth his actual and necessary expenses for traveling. These expenses would include transportation, food, lodging, telephone calls, postage and any other items necessarily expended by him when traveling in connection with the duties of his office and in doing the things required of him by law. If he traveled by public conveyance, his transportation expense would be the fare paid by him on such conveyances, but if he used his own car, he would be entitled to four cents per mile for his transportation expense. What are actual and necessary traveling expenses is always a question of fact, except the amount of mileage for use of his own car which is set by the statute at four cents per mile. If the county court refuses to pay the actual and necessary traveling expenses, it can be made to do so by proper legal proceedings. The law clearly contemplates that the superintendent shall be reimbursed for his actual and necessary traveling expenses.

Section 10618.5, supra, provides in part as follows:

"The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred fifty dollars (\$750) nor more than one thousand five hundred dollars (\$1500) annually to be determined and fixed by the county court, seven hundred fifty dollars (\$750) of which shall be paid by the state out of state school moneys, the same to be included by the State Board of Education as a part of the apportionment made before August 31 of each year. * * * The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state."

On July 23, 1946, this office gave an opinion to Mr. Marshall Craig, Prosecuting Attorney, Charleston, Missouri, on a statute which has identical provisions as Section 10618.5 and in that opinion we held that the county superintendent could employ a clerk without the consent of the county court. A copy of that opinion is enclosed herewith, and we adopt the same reasoning as to employing a clerk by the county superintendent under Section 10618.5 as is contained in said opinion, and, therefore, hold that a county superintendent in a fourth class county can employ a clerk without the consent of the county court.

Your third question is whether a teacher who is regularly employed by a school can be employed as clerk of the county superintendent in a fourth class county and do his work as clerk during hours he is not teaching. It will be noted that the statute above quoted prescribes no qualifications for the clerk to be employed. The county superintendent is merely granted the right and power to employ a clerk. Of course, a clerk does not determine policies, but merely does routine work under a supervisor. For that reason the legislature undoubtedly concluded that it was unnecessary to prescribe any qualifications for such clerk. Neither does the statute prescribe how many hours or what hours such clerk shall work. If the clerk does the work in a manner satisfactory to the county superintendent, that is all that is required. Since the state pays the first \$750.00 of the clerk's salary, it could make no difference to the county court how, or in what manner, the clerk performed his duties so long as the salary did not exceed that amount. If the superintendent proposes to pay more than \$750.00 annual salary to his clerk, the county court would have the right to determine whether it will bear any of such salary above said amount and if so, how much. If a clerk is employed at a salary of no more than \$750.00 per year, it is evident that the superintendent would have to get a part-time clerk only, as it would probably be impossible to secure a full time clerk at that salary. We see nothing against public policy in a school teacher doing clerical work for a county superintendent outside of his teaching hours.

CONCLUSION

It is, therefore, the opinion of this office that:

(1) The county superintendent of schools in a ~~city~~ ^{County} of the fourth class is entitled to be reimbursed for his actual and necessary traveling expenses, including transportation, board, lodging and other expenses necessarily expended by him while traveling in the performance of the duties of his office, not to exceed for any one year one-fourth of his annual salary, and if he uses his own car for traveling his transportation expense is set by law at four cents per mile;

(2) The county superintendent of schools may employ a clerk at a salary not to exceed \$750.00 without the consent of the county court; and

(3) A teacher who is regularly teaching may be employed as clerk of the county superintendent and perform the clerical duties outside the hours he teaches.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK/vlv

- SCHOOLS: (1)- Senate Bill 162 - reinvestment of certain school funds.
Senate Bill 186 - election favoring annual distribution of liquidated funds, such funds credited to the school funds desired by school board.
- (2a)- Threat of epidemic authorizes board to require vaccination before school attendance.
- (2b)--If vaccination rule is adopted, parent not in violation of compulsory school law for not permitting child to be vaccinated.

October 14, 1946

Filed No. 32

Honorable A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

Your recent request for an opinion from this department proposes the following questions:

"FIRST: If the voters of this county, accordance with provisions of Senate Bill Numbers 162 and 186 which were passed by the 63rd General Assembly, approve the annual distribution of the capital of the liquidated county and township school funds, to what fund or funds may the treasurer of a school district legally deposit or credit such funds upon receipt of such funds from the county treasurer?"

"SECOND: (a) Does a board of education have the authority to establish a rule that all children must be vaccinated against smallpox before such children are permitted to enroll in and attend school?

"(b) If such authority does exist and such rule is passed by a board of education and parent keeps his child out of school because he does not want such child vaccinated, does such parent violate the compulsory school law?"

Regarding the first question, we shall discuss Senate Bill 162 which became effective November 26, 1945, under an

Honorable A. L. Gates

emergency clause. That bill provides:

(Section 10376)

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund. On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; Provided, that all interest accruing from such reinvestment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into said fund, shall hereafter be collected and distributed annually to the schools of the county as hereinafter provided in this article."

(Section 10383)

"On and after the effective date of this act, all real estate loans and investments now belonging to the capital of the school fund of any township, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the

Honorable A. L. Gates

money then on hand belonging to said capital of township funds, shall be reinvested in registered bonds of the United States, or in bonds of the State, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government; Provided, that all interest accruing from such reinvestment of the capital of township school funds and all other moneys lawfully coming into said funds, shall hereafter be collected and distributed annually for the use of schools in any townships or parts of townships in the county as hereinafter provided in this article."

This bill calls for all real estate loans and investments, other than registered bonds of the United States, or bonds of the state, or approved bonds of cities or school districts thereof, or bonds or securities guaranteed by the United States government, to be liquidated by the county court without extension of time upon the maturity thereof and the funds received by such liquidation to be immediately reinvested in one of the securities excepted from liquidation. Of course, this situation is applicable in the event there is no election such as is provided for in Senate Bill 186, which was enacted by the 63d General Assembly and became effective March 26, 1946, under an emergency clause. It is the apparent intention of the Legislature that school funds should be invested only in those securities excepted in Senate Bill 162, in the absence of an annual distribution of the liquidated funds pursuant to an election under Senate Bill 186 requiring the same. Senate Bill 186 provides:

"Section 1. Whenever there shall be presented to the body having in its charge the capital of the county and township school funds of any county or the City of St. Louis a petition,

Honorable A. L. Gates

signed by qualified electors of said county or the City of St. Louis equal in number to five per cent of the voters casting a ballot in said county or the City of St. Louis for the office of governor at the last preceding general election at which said office was voted upon, praying that the proposal be submitted to the qualified electors for making annual distribution of the capital of the liquidated school fund, such body shall cause an election to be held upon said proposal.

"Section 2. Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor. Notice of such election shall be given by publication in some newspaper of general circulation within the county or City of St. Louis for not more than two weeks, the last insertion to not be longer than one week prior to the date of such election. The proposal shall be submitted on a ballot in substantially the following form:

"For annual distribution of the capital of the liquidated county and township school funds.

"Against annual distribution of the capital of the liquidated county and township school funds.

Said ballot shall carry upon it instructions to the voters to strike out the statement not indicating their preference. The voting shall take place at the regular election precincts in the area wherein such election shall be held, and the judges and clerks thereof shall be selected by the board having authority to make such appointments for general elections. Judges and

clerks shall be the same in number at each election precinct as is provided by law for general elections; and they shall receive the same compensation as may be provided for judges and clerks serving at general elections. The costs incident to such election shall be paid by the county wherein such election is held or by the City of St. Louis. Such special election shall be governed in all respects by the general election laws except wherein such general election laws are in conflict with this article. The results of the balloting at each election precinct shall be certified by the judges of election of such election precinct and attested by the clerks and transmitted to the body having control of the capital of the county and township school funds, which said body shall, from such results so certified and attested, within ten days, determine whether the proposal to distribute annually the liquidated capital of the county and township school funds has received a majority of the votes cast in the county or City of St. Louis wherein such election shall have been held. If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds to the school districts. The accumulated balance of such funds shall be apportioned on or before August 31 of each year, until such funds are liquidated and said apportionment shall be based upon the last enumeration on file in the office of the county clerk. Provided, that when the capital of such liquidated county and township funds are distributed to the school districts such funds shall not be counted as a deduction from the minimum guarantee for establishing the equalization quota as defined in Section 10454 of an Act of the 63rd General Assembly, known as Senate Bill 308, approved February 2, 1946." (Underscoring ours.)

Honorable A. L. Gates

Under this bill there may be an election on the proposition of whether or not the capital of the liquidated county and township school funds should be distributed. If the vote should be in favor of such distribution we must look to Section 10366 as found in the Laws of Missouri, 1943, at page 893, to determine which fund is eligible to receive this distribution. Section 10366 provides in part:

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'Teachers' Fund,' except as hereinafter provided. Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to the 'Incidental Fund'. Money apportioned for free textbooks shall be credited to the 'Free Textbook Fund'. All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the 'Building Fund'. Money derived from taxation for the retirement of bonds shall be credited to the 'Sinking Fund'. Money derived from taxation for the payment of interest on bonded indebtedness shall be credited to the 'Interest Fund'. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed to the credit of the fund from which the original expenditures were made. Money donated to the school district shall be placed to the credit of the fund where it can be expended to meet the purpose for

Honorable A. L. Gates

which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board. No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. No partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that tuition shall be paid from either the Teacher's or Incidental Funds if no part of the minimum guarantee is used for such purposes: Provided further, tuition and transportation costs shall be paid from either the Teachers' or Incidental Funds when the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law: Provided further that the Board of Directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that after all incidental obligations are paid, the board of directors shall have the power to transfer such portion of the balance remaining in the Incidental Fund to the Teachers' Fund as may be necessary for the total payment of all contracted obligations to teachers: Provided further that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund: Provided further, that when any school district has been disincorporated by state or federal agencies, the Treasurer for the school district, when directed by the County Superintendent of Schools, shall use the balances of moneys remaining in any or all funds to pay outstanding obligations of said district and shall transfer the unencumbered balance to the County

Honorable A. L. Gates

Interest School Moneys for distribution as provided in Section 10390. No county, township, or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such fund in accordance with Section 10454, Revised Statutes, 1939." (Underscoring ours.)

There is no particular fund designated as being the recipient of money distributed as the result of an election under Senate Bill 186. Therefore, the applicable portion of Section 10366 is that part which has been underscored by us and the school board may designate the fund or funds to be credited with the liquidated funds so distributed.

With regard to your second question, we believe that the case of State ex rel. O'Bannon v. Cole, 119 S.W. 424, 220 Mo. 697, 22 L. R. A. (N.S.) 986, will suffice. In that case the board of directors of a school district adopted the following order (page 702, Mo.):

"Whereas it has come to the knowledge of the board of education that smallpox exists within the school district; that they deem it necessary that all children attending school, who have not been vaccinated, must be vaccinated within thirty days."

This order was adopted pursuant to authority granted in Sections 9759 and 9764, R. S. Mo. 1899, Those sections are now Sections 10420 and 10340, R. S. Mo. 1939, respectively, and the same authority still exists. Therefore, if the order was proper at that time it would also be proper today.

Under that order two children were excluded from the schools because they had not been so vaccinated, and action was brought by the parent of the children to have them reinstated.

Honorable A. L. Gates

In deciding in favor of the school board, the Supreme Court of Missouri had this to say in 220 Mo., 1. c. 706:

"* * *We have no doubt that in the event of a threatened epidemic of smallpox such boards can pass a rule excluding all pupils who have not been vaccinated. That a person who has never been vaccinated is subject to the contagion of smallpox is general knowledge. That vaccination has reduced the ravages of this disease is also general knowledge. That the appearance of unvaccinated pupils in a public school at a time of a smallpox epidemic, would tend to break up and disorganize a public school, is unquestioned. That the school board has the power to absolutely suspend the school during epidemics of contagious or infectious diseases, we think can hardly be questioned. No court would compel the opening of a school under such circumstances. The power here exercised was a very similar power, and if these rules are reasonable, we see no reason why their enforcement should be prohibited."

In citing the case of *In the Matter of Rebenack*, 62 Mo. App. 8, with approval, the court further said, 220 Mo., 1. c. 707:

"In the *Rebenack* case, supra, it is said: 'In the nature of things, it must rest with the boards of education to determine what regulations are needful for a safe and proper management of the schools, and for the physical and moral health of the pupils entrusted to their care. If such regulations are not oppressive or arbitrary, the courts cannot, or should not, interfere.'"

It appears, therefore, that if there is an epidemic or threat of an epidemic then such order is not oppressive or arbitrary and the board would be authorized to adopt the order, otherwise not.

Supposing the order is adopted, you then desire to know whether the parent would violate the compulsory school law if he refused to have his child vaccinated. That situation

Honorable A. L. Gates

is answered in the same case of State ex rel. O'Bannon v. Cole, 220 Mo., 1. c. 711, wherein it is stated:

"One contention of respondent is that by reason of the Compulsory School Act of 1905, Laws of 1905, p. 146, the rules in question would force him to violate that law, and that under that law the rules enforced by the school board are void. This act in no way affects these rules. In the first place there can be no prosecution of a parent for failing to send his child to school under this Act of 1905 until after an officer of the school district has notified him to send such child and then if he fails a prosecution can be had. Respondent is in no danger of violating this law. The act makes it a misdemeanor to violate its provisions and we have yet to hear of a criminal case wherein a defendant was convicted of wilfully violating a law, when in fact he has manifested the disposition that this respondent has to comply with the strict letter of the law. But laying aside all levity, the act of the school board, whose officer must initiate the prosecution by giving notice, would be an absolute defense. Beyond all this, the Act of 1905 must be construed with the Whole body of the school law and when so construed it can be made to harmonize therewith to the end that there would be no violation of the law. The same question is discussed in a way in the Minnesota case, supra, wherein the court uses the language herein above quoted. It will be observed that the court says that all the statutes must be construed together." (Underscoring ours.)

Therefore, the answer to the latter part of your second question is in the negative.

CONCLUSION

In the premises, it is the opinion of this department that:

Honorable A. L. Gates

(1) The real estate loans and other investments in which county school funds, exclusive of the approved investments as provided in Senate Bill 162, are to be liquidated at maturity date without extension thereof and the funds received from such liquidation are to be reinvested in approved investments by the county court, unless an election is held pursuant to Senate Bill 186, and if such election is had and the vote is in favor of annually distributing the capital of the liquidated county and township school funds, the money so distributed will, under Section 10366, Laws of Mo., 1943, p. 893, be credited to the fund or funds designated in the discretion of the school board.

(2) If there is an epidemic or threat of an epidemic of small pox then the school board is authorized to adopt an order requiring all children to be vaccinated against smallpox before they are permitted to enroll in and attend school, otherwise not.

(3) If the school board is authorized to adopt an order requiring pupils to be vaccinated for smallpox before enrollment and attendance at school, the parent who keeps his child out of school because he does not want such child vaccinated, does not violate the compulsory school law.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

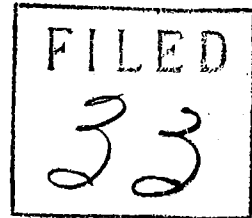
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

DRAINAGE DISTRICTS: Section 12435, R. S. 1939, authorizes the county court to use the maintenance fund of the drainage district to pay engineering costs incidental to estimate of cost of cleaning ditches of drainage district.

March 6, 1946



4-4

Honorable D. W. Gilmore
Assistant Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

Receipt of your request for an opinion from this department is hereby acknowledged, which reads as follows:

"The County Court of Scott County, Missouri, requests your opinion in the following matter:

"Does the County Court have authority to expend funds from the Maintenance fund of a Drainage District organized under the provisions of Article 3, Chapter 79, of the Revised Statutes of Missouri for 1939, in payment of engineering costs incidental to an estimate of the cost of cleaning out the ditches and laterals of the Drainage District in accordance with the provisions of Sec. 12435, R. S. Mo., 1939?"

"Section 12435, R. S. Mo., 1939, seems to be clear on this point, but one of the Judges of our Court requests your opinion.

"The petition provided for in Section 12435, in the matter now before the Court, has been presented. The County Surveyor is not considered competent to view the premises and make the report

required by the Statute. The Court is considering employing an engineer to make the report required by Sec. 12435. And the question is, as above stated, does the court have authority to pay the engineer out of funds now on hand in the Maintenance fund of the Drainage District in question.

"The matter is to be considered again on Monday, March 11th, 1946. If you could give us your opinion prior to that date it would be appreciated."

Section 12435, R. S. Mo. 1939, referred to in your letter, provides:

"When any ditches or other improvements constructed under this article need to be enlarged, cleaned out, obstructions removed therefrom or new work done, five or more of the owners of land originally assessed for the construction of any such ditches, or other improvements, may file a statement in writing with the county clerk setting forth such necessity. Upon the filing of such statement, it shall be the duty of the county court, at its next meeting thereafter, to direct the district engineer, or an engineer of their selection, as the case may be, to proceed at once to view the premises and to make a report to the court in writing of the repairs and improvements necessary to be made and the probable cost of making such improvements as will restore the said ditch, drain or levy to an efficient condition. It shall be the duty of the county court to forthwith consider said report and if the court finds that the improvements, or any of them, recommended in said report should be made, it shall direct the district engineer, or an engineer of their selection, as the case may be, to proceed with all due diligence in the making of such repairs and improvements, directing such engineer to purchase such supplies and

employ such labor as may be necessary to accomplish such repairs and improvements and make an itemized report to the court in that behalf, all of which shall be paid out of the maintenance fund of that district. If it shall be found by the court that repairs and improvements are necessary to be made at a cost in excess of the money available from the maintenance fund, then it should be the duty of the court to direct such repairs or improvements to be made as may be necessary and can be paid out of the maintenance fund and to cause the clerk thereof to set the hearing of the matter of the levying of an additional tax for such improvements as cannot be made out of the maintenance fund, for hearing on the first day of the next regular term of the county court, and to give notice of such hearing by publication in three issues of some weekly newspaper published in the county, the last insertion to be prior to the day set for the hearing, which said notice may be in the following form:

"Notice is hereby given to the land owners of drainage district No. _____ of _____ county, Missouri, that a statement has been filed with the undersigned clerk by five or more land owners of said district, alleging that the ditches or other improvements of said district, should be enlarged, cleaned out, have obstructions removed, or new work done and that the district engineer has viewed the premises and reported to the court the necessity for repairs and improvements in excess of the money available from the maintenance fund and that said statement and report of the engineer has been set down for hearing on the first day of the next _____ term of the county court and unless good cause to the contrary be shown, the county court will make an order requiring the district engineer, or an engineer of their selection, as the case

may be, to cause said ditches to be enlarged, cleaned out, obstructions removed therefrom and new work done as may be determined by the court and the cost of said work will be divided pro rata according to the original assessment of benefits against the lands included in such Drainage District."
(Emphasis ours.)

In answer to your request the pertinent parts of this section would be read as follows:

"When any ditches or other improvements constructed under this article need to be *, cleaned out * * * five or more of the owners of land originally assessed for the construction of any such ditches * * * may file a statement in writing with the county clerk setting forth such necessity. * * * it shall be the duty of the county court, at its next meeting thereafter, to direct * * * an engineer of their selection, * * * to proceed at once to view the premises and to make a report to the court in writing of the repairs and improvements necessary to be made and the probable cost of making such improvements * * * * * all of which shall be paid out of the maintenance fund of that district. * * *"

This section seems reasonably clear and applicable to the present situation. We are of the thought that the rule as found in the case of *Norberg v. Montgomery*, 173 S. W. (2d) 387, 1. c. 390, should be applied to the present situation. In that case it is held:

"* * * 'Rules for the interpretation of statutes are only intended to aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of the statute within narrower

limits than was intended by the law-maker." Sutherland on Statutory Const., Sec. 279. If the intention is clearly expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected. State ex rel. Wabash Ry. Co. et al. v. Shain, 341 Mo. 19. 106 S. W. 2d 898, loc. cit. 899, 900." (Emphasis ours.)

Conclusion

It is, therefore, the opinion of this department that said section does authorize the county court to use the maintenance fund of the drainage district to pay the engineering costs incidental to an estimate of the cost of cleaning out the ditches and laterals of the drainage district as suggested in your request.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

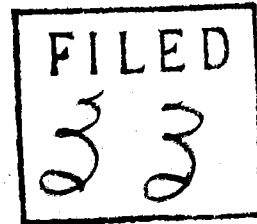
J. E. TAYLOR
Attorney General

JMA:EG

JONES-MUNGER LAW: Costs to be assessed against a purchaser at a tax sale. Purchaser of property upon which homestead rights are established not entitled to possession during period of redemption.

July 1, 1946

Honorable J. R. Gideon
Prosecuting Attorney
Forsyth, Missouri



Dear Sir:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"Please give me your official opinion on the following:

"1. Reference Chap. 74, Art. 9, Delinquent and Back Taxes, Revised Statutes of Mo. 1939, information is requested as to the proper costs which should be charged a purchaser at first, second, third and subsequent tax sales. It has been reported to me that these costs vary in different counties, ranging for instance from \$1.75 to \$7.00 for costs at a third sale. This difference is not due to costs of publication as the low cost was in a county that had only 25 tracts advertised while the high cost was in a county that had over 250 tracts advertised. Please inform me what the statutory costs are for first, second, third and subsequent sales and give me section numbers for reference.

"2. Reference as above, Sec. 11135 states that purchaser is entitled to possession one year from date of sale, homesteads excepted. Does this mean that if a homestead is purchased at a tax sale, possession can be taken immediately after the sale, if it is purchased during the redemption period? If not, what is the meaning of the term 'Homesteads excepted' in Sec. 11135?"

In reply to your first question, we would like to point out that there is no arbitrary amount of money which may be designated to cover the costs of every sale of land at a tax sale period. In that regard, it may also be said that the costs will generally vary between any two pieces of property, although each may be up for sale at the first, second, third, or subsequent time. A particular statutory charge may be entered as costs against one piece of property which may not occur as a charge against another.

We shall cite herein the various statutory provisions which are applicable in the assessment of costs as the result of delinquent taxes on property which may be charged to the purchaser of such property at a tax sale. Also included in Chapter 74, Article 9, of the Revised Statutes of Missouri, 1939, are some costs which are levied upon one who redeems property subsequent to a tax sale, and costs levied in connection with legal action brought to enforce tax liens, but these will not be included in this opinion.

Section 11126, R. S. Mo. 1939, provides:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.: Provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much

of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list. (Underscoring ours.)

This section was held to be constitutional in the case of State ex rel. Karbe v. Bader, 78 S. W. (2d) 835, 336 Mo. 259.

Section 11129, R. S. No. 1939, provides:

"If at the first offering of sale of any tract of land or lot under the provisions of this law no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this law

provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

Under this section, the property may be offered for sale a second time. All of the costs of the first offer are to be included in the costs of the second sale, along with the costs of such sale, so that the costs at the second offering would probably be higher for a given piece of property.

Regarding subsequent offerings of the property, if it has not been purchased at either of the first two sales, Section 11130, R. S. Mo. 1939, provides:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. If any lands or lots are not sold at such third offering, then the Collector, in his discretion, need not again advertise or offer such lands or lots for sale oftener than once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. A purchaser at any sale subsequent to the third offering of

any land or lots shall be entitled to the immediate issuance and delivery of a collector's deed and there shall be no period of redemption from such sales: Provided, however, before any purchaser at a sale to which this section is applicable shall be entitled to a collector's deed it shall be the duty of the collector to demand, and the purchaser to pay, in addition to his bid, all taxes due and unpaid on such lands or lots that became due and payable on such lands or lots subsequent to the date of the taxes included in such advertisement and sale. In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lots purchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs."

Each time a particular piece of property is offered for sale some costs will be added, at least in the process of advertising the same.

Section 11133, R. S. No. 1939, provides:

"After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the year or years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract. If the purchaser bid for any tract or

lot of land a sum in excess of the delinquent tax, penalty, interest and costs for which said tract or lot of land was sold, such excess sum shall also be noted in the certificate of purchase, in a separate column to be provided therefor. Such certificate of purchase shall also recite the name and address of the owner or reputed owner if known, and if unknown then the party or parties to whom each tract or lot of land was assessed, together with the address of such party, if known, and shall also have incorporated therein the name and address of the purchaser. Such certificate of purchase shall also contain the true date of the sale and the time when the purchaser will be entitled to a deed for said land, if not redeemed as in this law provided, and the rate of interest that such certificate of purchase shall bear, which rate of interest shall not exceed the sum of ten per cent per annum. Such certificate shall be authenticated by the county collector, who shall record the same in a permanent record book in his office before delivery to the purchaser. Such certificate shall be assignable, but no assignment thereof shall be valid unless endorsed on such certificate and acknowledged before some officer authorized to take acknowledgment of deeds and an entry of such assignment entered in the record of said certificate of purchase in the office of the county collector. For each certificate of purchase issued, including the recording of the same, the county collector shall be entitled to receive and retain a fee of fifty cents, to be paid by the purchaser and treated as a part of the cost of the sale, and so noted on the certificate. For noting any assignment of any certificate the county collector shall be entitled to a fee of twenty-five cents, to be paid by the person requesting such recital of assignment, and which shall not be treated as a part of the cost of the sale. No collector shall be authorized to issue a certificate of purchase to any non-resident of the State of Missouri or to enter a recital of any assignment of such certificate upon his record to a

non-resident of the state, until such purchaser or assignee of such purchaser, as the case may be, shall have complied with the provisions of section 11127 pertaining to non-resident purchasers." (Underscoring ours.)

This fifty-cent fee is assessable only at the first and second sales, since in subsequent sales the purchaser is entitled to a collector's deed and not a certificate of purchase, as provided in Section 11130, supra, wherein it is stated, "no certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed." Although the twenty-five cent fee for noting any assignment of any certificate is not to be treated as part of the cost of such sale, it is a proper charge which the county collector may assess for such act.

Section 11139, R. S. No. 1939, provides:

"The clerk of the county court shall attend, either in person or by deputy, as the clerk of the sale of such delinquent land, and shall enter the same on a sufficient record book giving a description of the proper tract or lot, showing how much of each was sold, to whom, and the price, or whether the same remains unsold. For his services as in this section provided he shall receive the sum of twenty-five cents on each tract of land or lot sold, to become part of the costs of sale and paid by the purchaser, which fee shall include entry or recital of redemption on such record." (Underscoring ours.)

This section is applicable to any of the sales.

Section 11150, R. S. No. 1939, provides:

"Such conveyance shall be executed by the county collector, under his hand and seal, witnessed by the county clerk and acknowledged before the county recorder or any

other officer authorized to take acknowledgments and the same shall be recorded in the recorder's office before delivery; a fee for recording shall be paid by the purchaser and shall be included in the costs of sale. Such deed shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed; and such deed shall be in the following form, as nearly as the nature of the case will admit, namely: * * *

(Form omitted.) (Underscoring ours.)

The fee included here is the same as recording any other instrument in the recorder's office.

Section 11182, R. S. Mo. 1939, provides:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two per cent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

The last sentence of this section may be assessed as costs by the collector of your county.

These are all of the statutory fees that may be assessed as costs of the sale of a piece of property under the Jones-Hunger Law, Chapter 74, Article 9, R. S. Mo. 1939. In the

absence of an itemized statement of costs at the many sales we cannot undertake to determine the reasons why such costs are at variance.

Therefore, as may be readily seen, there is no arbitrary sum as to which we may advise you for the costs to be assessed for any particular piece of property nor for any particular sale, although the sections cited herein are applicable in the determination of such costs.

Your second question involves that part of Section 11135, R. S. No. 1939, which states:

"The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this law, unless sooner redeemed; * * *"

The "redemption period" referred to in this section is provided by Section 11145, R. S. No. 1939, which states:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such re-

demption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time." (Underscoring ours.)

Therefore, at any time before the expiration of the two-year period immediately following the date of the tax sale at which the property was purchased, the owner or occupant of the land has an absolute right to redeem the property. This extinguishes all property rights of the purchaser at the tax sale in that particular parcel.

Under Section 11135, supra, such purchaser has the right to immediate possession of the property so purchased at any time after the expiration of one year from the date of sale, except in the case of a homestead. One who purchases property upon which homestead rights are established is not entitled to immediate possession at the expiration of one year from the date of sale under Section 11135, but instead is to be denied such right of possession. We refer to Section 11149, R. S. No. 1939, which provides:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the

county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

There is no such exception in this section. Therefore, the effect of Section 11135 would be to deny the purchaser of property, upon which homestead rights are established, the right to possession for an additional year, or in other words for two years after the date of the tax sale.

CONCLUSION

It is, therefore, the opinion of this department that, under Chapter 74, Article 9, R. S. No. 1939, there is no arbitrary sum which may be assessed as costs for first, second, third and subsequent tax sales. The following sections are applicable in the assessment of costs to one who purchases property at such sale--11126, 11129, 11130, 11133, 11139, 11150, R. S. No. 1939.

It is the further opinion of this department that, under Section 11135, R. S. No. 1939, the purchaser of property at

Hon. J. R. Gideon

-12-

a tax sale, upon which homestead rights are established, is not entitled to possession thereto during the period of redemption, or in other words, for a period of two years following the date of the tax sale.

Respectfully submitted,

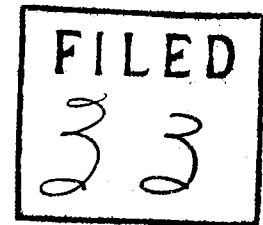
J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

21 J. Smith
SHERIFFS: Under House Bill 899, the sheriff is responsible
for feeding prisoners in the county jail in
COUNTY COURTS: counties of the third class.

July 10, 1946



Honorable D. Wilson Gilmore
Assistant Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

Your letter has been received requesting an official
opinion reading as follows:

"The County Court of Scott County request
information from your Office concerning in-
terpretation of the Legislative enactment
concerning feeding of prisoners in the County
jail.

"No doubt you have received other inquiries
on this subject. None of the County Courts
in the surrounding Counties seems to know
just what they are supposed to do under the
new law.

"If your office has prepared an opinion on
the subject, we would like to have a copy.
If you have not prepared an opinion, would
you please advise us as to your interpreta-
tion of the new law providing that the County
Courts are to assume the responsibility of
feeding prisoners in the County jail."

Investigation discloses that Scott County has a population
of 30,377, and an assessed valuation of \$16,024,202.00, thus
bringing it within the category of counties of the third class.

House Bill 899, enacted by the 63rd General Assembly, was
passed with an emergency clause, and was approved by the Governor
on April 19, 1946, thus making it effective as of that date.
This bill pertains to sheriffs in counties of the third class,
and Section 4 of the bill, in part, provides:

"The sheriff shall have the custody and care
of persons lodged in the county jail and shall

furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. * * *"
(Emphasis ours)

The wording of this section is unambiguous and clearly places the duty and responsibility of feeding persons lodged in the county jail upon the sheriff. Section 4, supra, further provides that the county court shall draw a warrant on the county treasury to reimburse the sheriff for the actual cost incurred by him in the feeding of persons under his custody, after a proper statement as prescribed in this section has been submitted to the county court by the sheriff.

Further, it is our opinion that Section 4 of House Bill 899 places no responsibility on the county courts of third class counties for feeding persons lodged in the county jail.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

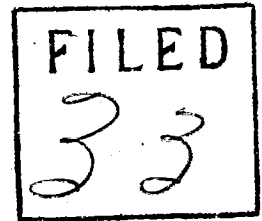
APPROVED:

J. E. TAYLOR
Attorney General

RFT:DC

SCHOOLS: School district does not have the power to improve adjacent city streets and this power is given to cities of the fourth class by Section 7197, R. S. Mo. 1939.

September 20, 1946



Honorable Robert L. Gideon
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date, requesting an opinion from this department, which reads as follows:

"Would you kindly give me an opinion on the following questions?

"1. Can a school district expend its incidentals fund in blacktopping streets adjacent to the school building. These are city streets and are not the property of the school district.

"2. If a school district is not authorized by law to blacktop or maintain any such street or streets, whose duty is it to do so? This is in a city of the fourth class."

Your letter presents two distinct questions, which will be answered in the order presented.

All monies received by school districts must be used for school purposes as provided by Section 10366, Laws 1943, p. 893, Sec. 1, which reads in part as follows:

"All school moneys received by a school district shall be disbursed only for the

purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. * * * * *

There is no obligation imposed on school districts for the upkeep of city streets adjacent to their property. Under the above statute all monies are specifically assigned to a certain fund and the purpose for spending the money out of each fund is also well defined. The only possible fund that an obligation of this type could be chargeable to would be the incidental fund. Money credited to this fund must come from revenue derived from taxation for incidental purposes. Therefore, it will be necessary to determine what is meant by incidental expenses. We believe that incidental expenses here refer to the expenses of a school district. A similar situation was decided by the Supreme Court of South Dakota in the case of F. C. Austin Mfg. Co. v. Twin Brooks TP., Grant County, 91 N.W. 471. In this case there was a similar statute that provided for levying taxes to defray the incidental expenses of a town. In limiting the expenditure chargeable to incidental expenses, the court stated, l. c. 472:

"* * * While the term 'incidental' has no clearly defined meaning, it cannot be extended beyond expenses necessarily incident to the ordinary conduct of the town business, and certainly not to expenditures not provided for by taxation, * * * * *"

Therefore, the incidental expenses in our proposition should be used to defray the expenses of a school district and could not be used for improving an adjacent city street, because the school district is not imposed with this duty.

In answer to your second question, I direct your attention to Section 7197, R. S. Mo. 1939, which provides:

"The cities coming under the provisions of this article, in their corporate capa-

cities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law: First. To levy and collect taxes for general revenue purposes on all mixed, personal and real property within the limits of said city, taxable according to the laws of this state. Second. To open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts, drains and sewers within the city, and to establish grades for all improvements herein mentioned. Such ordinances as may relate to any public work or improvements of any kind shall authorize the particular work to be done or improvements to be made, and shall specify the general character and extent thereof, the material to be used therein and in the alternative, if desirable, and the manner and regulations under which any such public work or improvement shall be executed. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city."

The above quoted statute clearly gives a city of the fourth class power to maintain and to improve streets within the limits of said city.

Conclusion

Therefore, it is the opinion of this department that a school district cannot expend its incidental fund to improve city streets; and, further, that a city of the fourth class has power to maintain and improve streets within the limits of the city.

Respectfully submitted,

APPROVED:

PERSHING WILSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

PW:CP

CONSERVATION COMMISSION:
AND FISH AND GAME:

IN RE: Section 40(a) Article IV, Constitution
1945, is self-enforcing and it is not necessary
for the Legislature to enact a statute permitting
the Conservation Commission to promulgate rules
and regulations. Construing House Bill #366.

March 12, 1946



H.H.
Honorable Clark H. Gore
Prosecuting Attorney, Atchison County
Rock Port, Missouri

Dear Mr. Gore:

This will acknowledge receipt of your request for an
official opinion, which reads:

"I have a Fish and Game problem on which I
would appreciate your opinion.

"The Wildlife and Forestry Code of Missouri,
put out by the Conservation Commission, sets
out various rules and regulations, some of
which are duly enacted statutes, and others
are merely rules of the commission.

"The local game warden has made an affidavit
charging a man with fishing without a license
illegally using a trammel net, and catching
and having in his possession game fish in a
closed season.

"Of course Section 8918, R. S. Mo. 1939, makes
it a misdemeanor to fish without a license,
but the other violations are not covered by
statute and not too clear in the rules and
regulations of the commission. Sec. 62 and 55.

"I also have Senate Bill No. 366, which re-
peals the old fish and game law, and enacts
28 new sections in lieu thereof. This bill
attempts to give the commission authority
to enact rules and regulations, the violation
of which will be misdemeanors, and punishable
in courts of law. This authority is referred
to frequently in the bill, but is not specif-
ically given, as I read it.

"I would like to have your opinion on:

"1. Under present law, are violations of the

wildlife and forestry code punishable by criminal action as misdemeanors, when the acts complained of are not covered by statute?

"2. If this new bill is enacted, will the commission have power to make rules which will have the force of statute and be punishable in courts of law?

"I inclose my information (copy) in this case, and wish you would look it over. The defendant says nobody is going to make him buy a license or pay a find, and he will take the case to the Supreme Court to prove he is right.

In answer to your first inquiry, we are enclosing a copy of an official opinion rendered by this department under date of July 17, 1945, to Honorable John H. Keith, Prosecuting Attorney of Iron County, holding that Section 8967, R. S. Mo. 1939, fixes a penalty for the violation of reasonable rules and regulations adopted and promulgated by the Conservation Commission of the State of Missouri. It is our opinion that the enclosed opinion fully answers your first inquiry.

As to the second request in your letter, it is not the policy of this department to pass upon the validity of bills introduced by the General Assembly until same are finally passed and approved, except, of course, when such requests are made by members of the General Assembly or the Governor. This is not usually done for the reason that there is a great possibility that said bill may be amended or that said bill may never be enacted into a law.

However, upon an examination of Committee Substitute for Senate Bill No. 366, we find that Sections 26 and 27 of said bill clearly and specifically provide for punishment for violation of rules and regulations not heretofore provided for, and several other provisions in said bill provide for a special penalty for some particular violation. We do not find any specific authority in said bill for the Conservation Commission promulgating reasonable rules and regulations, however, we consider such statutory authority unnecessary. Section 40(a), Article IV, Constitution 1945, vests in the Conservation Commission the control, management, restoration, conservation and regulation of birds, game, fish, forestry and all wild life resources of the State of Missouri. Said provision reads, in part:

"The control, management, restoration, conservation and regulation of the bird, fish, game forestry and all wild-life resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * *"

Section 44 of the same Article makes Sections 40 to 43, inclusive, self-enforcing and reads:

"Sections 40-43, inclusive, of this article shall be self-enforcing, and laws not inconsistent therewith may be enacted in aid thereof. All existing laws inconsistent with this article shall no longer remain in force or effect."

Furthermore, Section 45 of the same Article deals with the time said rules and regulations promulgated by the Conservation Commission shall become effective. Said section reads:

"The rules and regulations of the commission not relating to its organization and internal management shall become effective not less than ten days after being filed with the Secretary of State as provided in section 16 of this article, and such final rules and regulations affecting private rights as are judicial or quasi-judicial in nature shall be subject to the judicial review provided in section 22 of article V."

Also, Section 46 of the same Article requires the Conservation Commission to supply, upon request, printed copies of its rules and regulations, and reads:

"The Commission shall supply to all persons on request, printed copies of its rules and

regulations not relating to organization or internal management."

In *Marsh v. Bartlett*, 121 S. W.(2d) 737, an original proceeding in habeas corpus was instituted to release the petitioner from the custody of the sheriff of Dallas County, Missouri. The petitioner, Marsh, was arrested on May 28, 1939, and charged with catching a large mouth bass during a closed season as provided in Section 8270, R. S. Mo. 1939. The aforesaid statute fixed a closed season between April 1st and May 30th of each year. The petitioner's answer set up that said statute was repealed by the Constitutional amendment No. 4 (said amendment creating the Conservation Commission and prescribing its duties, etc.) and was supplemented by a regulation prior to the offense charged. Said regulation was adopted by the Conservation Commission on April 11, 1938, and established a closed season for catching such fish between April 1st and May 28th, for the year 1938, which regulation was in effect from and after April 11th of said year. The Supreme Court, in the above case, did not specifically hold that the Conservation Commission was authorized, under the above Constitutional amendment, to adopt rules and regulations for the control, management, restoration, conservation and regulation of fish, however, we think the court did, at least by implication, so hold. In *Marsh v. Bartlett*, the Court said:

"(10) The reference already made to the power the people reserved to themselves in section 57 of Article 4 with the express right to exercise the same without let or hindrance of the General Assembly, will be recalled to mind. This power, a political one, and the exercise of its functions is of the essence of sovereignty which resides in the people. In the Bill of Rights (sec. 1, art. 2) as found in the Constitution, Mo. St. Ann. Const. art. 2, Sec. 1, it is declared 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.' In view of these reservations of sovereignty and of the right to exercise functions thereof in the State's government, it seems self-evident that the exercise thereof in this particular instance to provide in the mode selected and to the extent effected by an enduring ordinance, policy-forming as to its subject matter and rule-delegating

as regards the administrative functions and imposed duties, was valid notwithstanding the general field for action by way of statutory enactments had theretofore been entered solely by successive legislatures. That condition, long existing, continued merely because until of late the people did not attempt to exercise their stated reserved authority.

"But the present attempt to exercise it does not deprive the legislative department of the government of its power or functions but relates to only a small portion of the power reserved to the people, the exercise of which suspends and supersedes the power of the legislature as to that portion alone which involves the subject matter and its governance as provided in said Amendment.* * *"

* * * *

"It therefore follows that penalizing and general section 8311 appropriately operates upon all violations of reasonable rules and regulations established by the Conservation Commission concerning the matters committed to it by said Amendment No. 4. The regulation under consideration here is apparently a reasonable one, and was in force and controlling on May the twenty-eighth last and the provisions thereof in effect. It is also obvious the Amendment is self-enforcing."

CONCLUSION

Therefore, in view of the foregoing constitutional provision, and especially Section 40, supra, providing that the Conservation Commission shall have control, management, restoration, conservation and regulation of birds, fish, game, forestry and wildlife resources and, furthermore, specifically making sections 40 to 43, inclusive, of Article IV of the Constitution of 1945, self-enforcing, it is the opinion of this department that the Con-

servation Commission of the State of Missouri needs no statute to authorize it to promulgate and adopt reasonable rules and regulations for the control, management, restoration, conservation and regulation of birds, fish, game, forestry and all wildlife in the State of Missouri.

You further request that we examine the attached copy of an information you have filed in the case of State v. Charley Morrison. The form you enclosed is the usual form that most prosecuting attorneys have relied upon for violations of fish and game laws and regulations adopted by the Conservation Commission. We have no knowledge of any appellate court decision construing such information for the violation of rules and regulations adopted by said Commission. However, it has been and is now our opinion, and we have so advised prosecuting attorneys, that information drawn for the violation of rules and regulations adopted by the Commission should be pleaded and proved just as in the case of the violation of the Public Service Commission rules or those of other Boards and Bureaus. (See Anderson v. Kraft, 129 S. W. (2d) 85, l. c. 89 and 90; also, Moss v. Wells, 249 S. W. 411, l. c. 414; City of St. Louis vs. Barney Kruempler, 235 Mo. 710, l.c. 719; Wooldridge vs. Scott County Milling Co. 102 S. W. (2d) 958, l.c. 964 to 967.)

We are hereto attaching a form which we recommended for the violation of certain rules and regulations adopted by the Conservation Commission in another case.

Respectfully submitted,

APPROVED: .

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

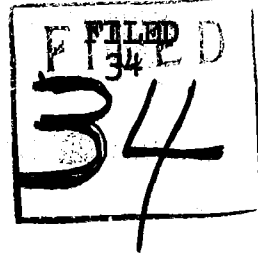
ARH:mw

SPECIAL ROAD DISTRICTS: Board of commissioners of special road district (benefit assessment type) may issue warrants up to amount of revenue anticipated for year in which such warrants are issued, and may by contract provide protested warrants shall bear interest at a specified rate. If no such provision is in the contract, protested warrants shall bear interest at 6%.

ROADS AND BRIDGES:

WARRANTS:

October 10, 1946



Honorable Clark H. Gore
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"The County Treasurer and County Court of Atchison County have asked me to write you for an opinion on the following matter:

"Is it permissible for a road district organized under Article 11 of Chapter 46 (benefit assessment) to issue protested warrants which bear a fixed rate of interest?"

Section 8717, R. S. Mo. 1939, provides that the commissioners of a road district organized under the provisions of Article 11, Chapter 46, R. S. Mo. 1939, may issue road and bridge bonds for their district, and that such bonds may be sold and the money used for certain purposes in the district. The entire amount of the money to be spent in the district, under this section, is realized by sale of the bonds.

Section 8721, R. S. Mo. 1939, provides for an assessment of property in the district for special benefits, and provides that special tax bills shall be issued against the land, and if such tax bills are not paid, the commissioners may borrow money on said tax bills.

Section 8722, R. S. Mo. 1939, provides that when the special tax bills issued against land on special assessments are to be paid in annual installments, the commissioners

shall issue special assessment bonds of the district, and shall sell said bonds to obtain the money for the work authorized to be done under the special assessment.

Section 8714, R. S. Mo. 1939, provides that the commissioners of the special road district shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe.

Section 8715, R. S. Mo. 1939, provided for the levying of taxes in the district by the county court, and that such taxes raised from property situated in a special road district shall be turned over to said special road district, and the commissioners of such road district shall have power to spend this money.

Section 8715, R. S. Mo. 1939, was repealed by House Bill No. 796, which also repealed Section 8716 and enacted a new Section 8715 in lieu thereof, reading as follows:

"County courts shall cause to be set aside and placed to the credit of each road district so incorporated four-fifths of such part or portion of the tax arising from and collected and paid upon any property lying and being within any such district, by authority of Section 8527. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts, within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

Section 8527, referred to in House Bill No. 796, is now found in House Bill No. 784, which bill repealed Sections 8526 and 8527 and reenacted Section 8527.

Section 8713, R. S. Mo. 1939, provides that the president of the board of commissioners of a special road district shall sign all warrants. The secretary of said board of commissioners shall keep a record of the warrants and attest the same, and the treasurer of the road district shall pay out money only on warrants signed by the president, or vice president in the absence of the president, and attested by the secretary.

From the above statutory provisions, it is clear that the question of whether or not warrants can be protested, and the matter of paying interest on protested warrants, would involve only warrants on the annual amount of moneys provided for the special road district by Section 8715 of House Bill No. 796, since the moneys provided for in the other sections cited are all collected by the district when bonds are issued or when money is borrowed on the special assessment tax bills.

The two questions involved relative to the matter of the protest of warrants, then, are: (1) Can the board of commissioners issue warrants which may be presented for payment and protested by the treasurer because of insufficient funds in the treasury to pay the warrants, and (2) if such warrants can be protested, can the board of commissioners specify the rate of interest that the warrants shall bear.

We hold that the board of commissioners has the power to spend in each year the revenue anticipated in that year, and to issue warrants against such anticipated revenue. The Supreme Court of Missouri, in *Hawkins v. Cox*, 66 S. W. (2d) 539, 1. c. 543, said:

" * * * The contract of purchase being made in February, 1928, the commissioners had a right to contract with reference to the funds then on hand as a cash payment and the anticipated tax collections of that year on the rates levied, as such was 'the income and revenue provided for that year,' but no further. * * *"

It has been held that a county warrant is in effect a promissory note. It is said by the Supreme Court of Missouri in *International Bank of St. Louis v. Franklin County*, 65 Mo. 105, 1. c. 112:

" * * * In short, it is to all intents and purposes the promissory note of the county.
* * *"

In the case of Steffen v. Long, 165 Mo. App. 254, 1. c. 258, it is said:

" * * * A warrant is, in legal effect, a promissory note. * * *"

A warrant from a special road district, of course, is evidence of an indebtedness due by the road district to some person, and is in effect a promissory note of the district.

There is no statutory provision in Chapter 46, Article 11, R. S. Mo. 1939, directing the treasurer of the road district to endorse warrants which have been issued by the district and for which there is no money in the treasury to pay said warrants when presented, as is contained in Section 8703, regarding the payment of warrants by an eight-mile special road district organized under the provisions of Article 10, Chapter 46, or Section 6654, regarding action to be taken by treasurers of cities of the second class when warrants are presented and there is no money in the treasury, or Section 13833, regarding the action to be taken by county treasurers when county warrants are presented and there is no money to pay said warrants, or Section 7346, regarding the treasurer of municipal corporations, found in Article 11, Chapter 38, entitled "Miscellaneous Provisions Applicable to all Cities, Towns and Villages."

The Supreme Court of Missouri said, in regard to the payment of interest on county warrants, in the case of Isenhour v. Barton County, 190 Mo. 1. c. 176, 177, 178:

"It is conceded by the parties that the rule has been, in this State, since 1831, that county warrants bear interest from the date of their presentment for payment and refusal to pay because of no money applicable thereto. (Robbins v. Co. Court, 3 Mo. 57; Skinner v. Platte Co., 22 Mo. 438; State ex rel. v. Trustees, 61 Mo. 158.)

* * * * *

"It has already been pointed out that the statutes relating to county warrants make no provision whatever for the payment of interest

thereon, but that this court has held that they do bear interest and that the general statute in reference to interest is as applicable to such warrants or the debts they evidence, as to any other character of debts. The Legislature evidently intended that such should be the case, and the failure to provide specially for interest was not a mere casus omissus. For ever since 1865 there has been a provision upon the statutes of this State in reference to city warrants, similar to the provisions herein set out as to county warrants and the protesting of the same when there was no money to pay them, except that it was further provided that such warrants so protested should draw legal interest until funds for the payment thereof should be set apart therefor. * * *

"It is obvious, therefore, that the Legislature intended that the general statute in reference to interest should govern such cases. The statute in referring to interest (sec. 3705, R. S. 1899) provides that in the absence of an agreement between the parties, interest shall begin to run after the debt becomes due and demand shall have been made. But the statute contains no provision or regulation as to the demand. Hence the general rules of the common law as to demand apply, for the common law is the law in this State except so far as it has been modified by statute. * * *"

It is provided, however, in Section 3226, R. S. Mo. 1939, as follows:

"Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

Since the warrants of a special road district are in effect promissory notes, after demand has been made, interest on such warrants will run from the time the demand is made and there is no money in the treasury to pay the same.

However, warrants can be issued only up to the amount of revenue anticipated for the year in which such warrants are issued. The Supreme Court of Missouri said in the case of *Hawkins v. Cox*, cited above, 1. c. 543:

"* * * Municipal corporations, such as are special road districts, are by our Constitution placed on what has been termed a cash basis. This has been accomplished by the provisions of section 12, article 10, of the Constitution, which provides that 'no county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose.' The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in *Book v. Earl*, 87 Mo. 246, where this court said: 'The contracting of a debt in the future, by the county in any manner or for any purpose, in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited. '* * * The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which

might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

"This provision of the Constitution is self-enforcing and limits the power of this road district 'to become indebted in any manner or for any purpose' beyond the revenues provided for the year. * * * "

The provisions of Section 12, Article X of the Constitution of 1875 are now embodied in Section 26, Article VI of the Constitution of 1945.

The special road district may, then, issue warrants up to the amount of revenue anticipated for the year in which the warrants are issued, and warrants so issued which cannot be paid because of insufficient funds in the treasury will draw interest under the provisions of Section 3226, R. S. Mo. 1939.

It has been held by this department that, under the Constitution of 1875, a county court could make an order setting the rate of interest at five per cent to be paid on protested county warrants on accounts which were consummated and which became due and payable after such order made by the county court, but that warrants which became due and payable before such order is made will bear interest at six per cent, under the provisions of Section 3226, and that protested warrants for paying public officers' salaries should bear interest at six per cent. This opinion was based upon the fact that since the county court, under the Constitution of 1875, is a court of record, the order fixing the interest on protested warrants at five per cent was a public order, and all who contracted with the county did so with notice of such order.

Notice given to all who contracted with a special road district, contained in the written contract entered into by

by the road district, would be sufficient to bind the road district and the person with whom they contracted. The road district, then, may specify in its contracts the rate of interest to be paid on warrants if there is insufficient funds in the treasury to pay said warrants when presented. If no such provision is contained in such contracts, the interest rate on the warrants would be six per cent, as provided in Section 3226.

CONCLUSION

It is the opinion of this department that a road district organized under the provisions of Article 11, Chapter 46, R. S. Mo. 1939, may issue warrants up to the amount of revenue anticipated for the year in which such warrants are issued, and that the road district may provide in its contracts for the rate of interest to be paid on such warrants where there is insufficient funds in the treasury to pay such warrants when presented for payment. If no interest rate is specified in the contracts, such warrants, when presented for payment and not paid because of insufficient funds, shall bear interest at the rate of six per cent per annum.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CONSTITUTIONAL LAW:

Under Sections 18 and 25, Article 5, Constitution of 1945, justice of the peace not licensed to practice law cannot hold offices of probate judge and magistrate in counties with 30,000, or less, inhabitants.

Mimeo.

March 6, 1946

FILED

35

3/8

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

This department has received your letter requesting an official opinion, which reads as follows:

"I would like to have your opinion on Section 25, Article 5 of the new Constitution of Missouri relative to the qualifications of Probate Judges and Magistrates.

"I would like to know if a justice of the peace, now in office, would be eligible to the office of probate judge and magistrate in a county with a population under 30,000.

"This justice of the peace is not licensed to practice law. Section 25, Article 5 provides a probate judge may succeed himself in office, also that a justice of the peace, now in office is eligible to the office of magistrate.

"So the part in question is 'would a justice of the peace be eligible to the office of probate judge and magistrate in a county under 30,000 population, where the probate judge shall be judge of the magistrate court.'"

After studying the facts presented, the principal question involved in your request is whether, under the Constitution of 1945, a justice of the peace now in office is qualified to hold the offices of probate judge and magistrate in a county with a population under 30,000, although he is not licensed to practice law.

Section 18, Article V of the Constitution of 1945, provides in part:

" * * * * In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court.
* * * *"

That portion of Section 25, Article V of the Constitution of 1945, pertaining to the question, is as follows:

" * * * * Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

In answering your question, certain principles of constitutional construction and interpretation must be observed in construing the relevant provisions of the Constitution. The following appears in 16 C. J. S., Section 16, page 51:

"A constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it."

This rule is pronounced in *Graves v. Purcell, et al.*, 337 Mo. 574, 85 S. W. (2d) 543, l.c. 547.

Again, in 16 C. J. S., Section 14, page 49, it is stated:

"A constitution should be construed as fundamental law and should be interpreted in such a manner as to carry out the broad general principles of government stated therein."

Also, in Section 17 of 16 C. J. S., page 55, the following appears:

"Unless the meaning of the terms employed is not clear, questions as to the wisdom, expediency, or justice of a constitutional provision play no part in the construction thereof."

In *Stockburger v. Jordan*, 76 Pac. (2d) 671, 10 Calif. 636, there was involved the construction of a constitutional provision relating to the people's power of referendum. At Pac. loc. cit. 677, the court expressed the following:

" * * * * We have nothing to do with the policy of the law as expressed in this section of the Constitution, and can neither approve nor condemn the same. Our duty begins and ends with the interpretation of the language so used in the Constitution, and with ascertaining the meaning thereof. This we have attempted to do, regardless of the reasons which may have prompted those responsible for the enactment of this provision of the Constitution."

Again, in 16 C. J. S., Section 18, page 55, the following is stated:

"A clear and unambiguous constitutional provision cannot be evaded by construction because it works a hardship or absurdity, but a construction which will have such effect will be avoided if possible."

In State v. Missouri Workmen's Compensation Commission, 2 S. W. (2) 796, 318 Mo. 1004, the question of when the Workmen's Compensation Act went into effect was involved. In ruling on the constitutional question, the court said at S. W. loc. cit. 802:

"Nor can we change the Constitution by mere force of our opinion, just because some hardships may be occasioned by following the Constitution. * * *"

In 11 Am. Jur., Section 53, pages 661 and 662, it is stated:

"In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision, and if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.

"It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. * * *"

In connection with the above quotation, we cite the case of Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983, where there was involved the problem of the Legislature having the power to release persons from payment of taxes. In ruling on certain constitutional provisions, the following appears at S. W. loc. cit. 137:

"* * * * The rule is that a Constitution is to be construed as a whole, and 'effect is to be given, if possible to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. * * * It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. Every provision should be construed, where possible, to give effect to every other provision.' * * * *"

Another rule of constitutional construction that applies in the instant case is found in 16 C. J. S., Section 21, page 61, which is as follows:

"Ordinarily the enumeration of specified matters in a constitutional provision is construed as an exclusion of matters not enumerated, unless a different intention is apparent."

All of the rules of constitutional construction and interpretation herein cited have been used many times, and numerous citations can be found in the various legal digests.

In Section 18, Article V of the Constitution of 1945, supra, it is provided that in counties with 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. However, the converse of this proposition would not be true. The clear and unambiguous expression of one proposition excludes the application of another.

Section 25, Article V of the Constitution of 1945, supra, provides the qualifications for probate judges, and among those stated it is necessary that the probate judges be licensed to practice law, except that those who are now in office may succeed themselves as probate judges without being so licensed. Therefore, in counties with 30,000 inhabitants or less, for a person not licensed to practice law to be probate judge he must already be holding the office or succeed himself as probate judge. This is the only exception to the provision that probate judges shall be licensed to practice law and excludes the expression of any other exception.

Conclusion.

In view of the foregoing, it is the opinion of this department that in counties with 30,000 inhabitants or less a person now holding the office of justice of the peace is not qualified to hold the offices of probate judge and magistrate if he is not licensed to practice law, because he is not qualified to hold the office of probate judge.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

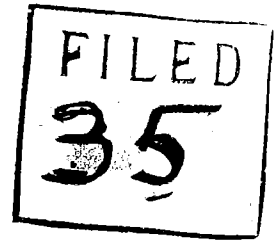
APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

MARRIAGE LICENSES: IN RE: Filing of health certificates prior to the issuance of the licenses.

March 25, 1946



Honorable G. Derk Green
Judge 12th Judicial District
Marceline, Missouri

Dear Sir:

In answer to your recent inquiry regarding the issuance of marriage licenses and the filing of certificates of serological tests as provided for by the statutes, the primary rule of construction is found in the case of State ex rel. City of St. Louis v. Caulfield, 62 S. W. (2d) 818, 332 Mo. 270, where it was held that, in interpreting unambiguous statutes, the legislative intent is the primary consideration. For numerous cases to the same effect, see Mo. Digest, Statutes, Key 180 and following.

Your particular question concerns the interpretation of two sections of Missouri Statutes, Laws of 1943, which will be dealt with in order, guided by the rule of the Caulfield case, supra.

Section 3364, Laws of 1943, page 640, was an act to repeal the old section 3364 of Chapter 20, R. S. Mo. 1939, and enact a new section, the present one under discussion, relating to marriages and marriage licenses. In the new section, found in the Laws 1943, supra, the following parts are, we believe, pertinent to the discussion of the instant problem.

"Previous to any marriage in this state, a license for that purpose shall be obtained from the officer authorized to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, * * *. Before applicants for a marriage license shall receive a license, and before the Recorder of Deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be

issued, present an application for the license to the Recorder of Deeds. Upon the expiration of three days after the receipt of such application, duly executed and signed, the Recorder of Deeds shall issue the license, * * *"

The above quotation sets up the following requirements: One, that a marriage license must be obtained in order to marry, and second, that before the license is issued the application for same must have been on file at least three days before the date of issuance. There is no doubt or ambiguity in that statutory requirement.

The second section of the statutes that concern the present problem is Section 3364 A, found in Laws of 1943, page 641, this law became effective January 1, 1944, and in its pertinent parts, provides as follows:

"It shall be unlawful for the Recorder of Deeds of any County or City to issue a marriage license, to any person, unless such person presents and files with such Recorder of Deeds a report of a negative laboratory serological test for syphilis and an affidavit signed by the applicant that to his or her best knowledge and belief he or she is free from syphilis; or unless, in the case of an applicant with a positive test, such applicant presents and files a certificate from a physician duly licensed to practice in the State of Missouri stating that to his or her best knowledge and belief, after having made a thorough physical examination of such applicant, he or she is not infected with syphilis, or if so infected is not in the stage of the disease wherein it is communicable either to the spouse or the offspring, which said physician's certificate shall have attached thereto a laboratory report of the test of syphilis made by such laboratory; or unless a duly licensed physician presents a certificate stating that one of the applicants for a license to marry is on his or her deathbed and unlikely to consummate the marriage or that an applicant is pregnant. The laboratory report of the negative blood test and the affidavit

of the applicant, and the physician's certificate of health with the laboratory report of the test for syphilis attached thereto, shall be made not longer than fifteen (15) days before the date of the issuance of the license and said license shall be void after ten (10) days from the date of issuance."

A reading of said quotation shows that the person seeking to have a marriage license issued to said person must file, with the Recorder of Deeds, a report of a laboratory serological test and an affidavit signed by the applicant that "to his or her best knowledge and belief is free from syphilis". The statute provides for some exceptions with which we are not concerned in the present discussion. The quotation above goes on to state that the laboratory report and the affidavit of the applicant for the marriage license must not have been made more than fifteen (15) days before the date of issuance of the license and that, having complied with this and having had a license issued, said license will be void ten (10) days after the date of its issuance in the event it has not been acted upon.

There is no direction in the statutes regarding the specific time for filing said laboratory tests and affidavit of applicant with the County Recorder of Deeds. The County Recorder is an officer receiving his authority from the existing law and discharging his duties in accordance therewith. No public officer can exceed the duties or powers imposed upon or granted him by law; *Hastings v. Jasper County*, 282 S.W. 700, 314 Mo. 144.

An examination of the statutes under discussion will show that they contain no direction to the county recorder to require that the report of the laboratory and the applicant's affidavit be filed at any particular time, other than prior to the issuance of the license.

While the two sections of the statutes discussed relate to marriage and the issuance of licenses therefor, Section 3364 refers to the application for a license; and Section 3364 A refers to the certificate of the laboratory test and the applicant's affidavit, with provision for exceptions contained therein.

It might be pointed out that the two sections of the statutes, Sections 3364 and 3364 A, while belonging to the same chapter, Chapter 20, Marriages, were the subject of different House Bills and approved at different times, and enacted for different purposes as expressed in the body of the statutes. Section 3364 was originally House Bill No. 20, 1943, and was approved April 7, 1943. It is patent that the purpose was to prevent hasty marriages.

by requiring a three day waiting period between the application for the marriage licenses and its ultimate issuance. Sections 3364 A to D was Committee Substitute for House Bill 45, 1943, and were approved April 13, 1943, but did not become effective until January 1, 1944, as provided in the Act. The obvious purpose of these four sections of the statutes was to prevent the marriage of persons affected with venereal diseases. It is, therefore, seen that while these statutes, Section 3364 and Sections 3364 A to D, R. S. Mo., 1939, are found within the same chapter, Chapter 20, Marriages, and while they are construed together, they do have different purposes and each should be given credit.

CONCLUSION

Construing these statutes together, it is the opinion of this office that, one, under Section 3364, Laws 1943, page 640, an application for marriage license must be on file with the Recorder of Deeds at least three (3) days before the issuance of said license. Two, that the laboratory report and the affidavit of the applicant shall be filed with the Recorder of Deeds prior to the issuance of the license. Three, that the laboratory report and the applicant's affidavit be not made more than fifteen (15) days prior to the date of the issuance of said license. Four, there is no requirement, either express or implied, in the statutes cited, supra, that the laboratory report and the applicant's affidavit be filed at any specific time. Said laboratory report and affidavit of applicant may be filed at any time within the fifteen (15) day period prior to the issuance of the license. It is only necessary that the requirements of the statutes, in regard to the laboratory report and affidavit, be complied with before the Recorder of Deeds issues the said license, in fact.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

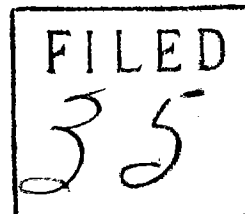
APPROVED:

J.E. TAYLOR
Attorney General

WCB:mnw

BARBERS: Applicant for renewal of certificate of registration must pass examination if certificate is not renewed within two years, though part of time was spent in military service.

April 24, 1946



Mr. J. C. Green, Secretary
State Board of Barber Examiners
St. Louis 2, Missouri
Box 253
Doniphan, Missouri

Dear Sir:

This department acknowledges receipt of your request for an official opinion, reading as follows:

"Section 10132 of the Revised Statutes of Missouri, 1939, among other things provides as follows: 'Any person failing to renew his certificate of registration for barbers license not exceeding two years may reinstate said certificate of registration upon the payment of \$2.00 for each delinquent year in addition to the \$5.00 reinstatement fee prescribed herein but any barber failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications, etc.'

"We have an applicant for a barbers license who held a license until a few months before he entered the United States Army in World War II and he let a period of time of more than two years expire before making application to be reinstated; however excluding the time that he was in service, the time was much less than two years.

"Our question is in computing the two years time of limitation in which he must renew his certificate in order to avoid appearing

before the board, for an examination, must the time spent in service be included or can it be excluded."

The principal question contained in your request is, should the time spent in the military service by a person applying for a renewal of his registration certificate be considered in determining whether such person has failed to renew his certificate of registration for a period exceeding two years.

Section 10132, R. S. Mo. 1939, states the time that barbers must apply for renewal of certificates of registration and provides as follows:

"Every person now engaged in the occupation of barbering in this state shall, within ninety days after the approval of this law, file with the secretary of said board a written statement, setting forth his name, residence and the length of time during which and the place where he has practiced such occupation, and shall pay to the treasurer of said board \$2.00; and a certificate of registration entitling him to practice the said occupation for the fiscal year ending January 31, 1922, thereupon shall be issued to him, and the holders of such certificates shall, annually, on or before the expiration of their respective certificates, make application for the renewal of same, stating the number of his expiring certificate, and shall in each case pay to the treasurer of said board the sum of \$2.00 therefor. For any and every license or certificate given or issued by the board a fee of \$2.00 shall be paid by the person receiving the same. Should any person holding a certificate of registration as a barber fail to make application for renewal of same within the time prescribed herein, such person shall be required to pay the sum of \$5.00 to the treasurer of said board, in addition to the regular registration fee provided for herein. Any person failing to renew his certificate of registration for a period not exceeding two years may reinstate said certificate of registration upon the payment of \$2.00 for each delinquent

year in addition to the \$5.00 reinstatement fee prescribed herein, but, any barber failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications to practice said occupation and shall pay to the treasurer of said board the regular examination fee as is prescribed in the following section."

(Emphasis ours.)

Counting the time that the applicant was in the service, a period of more than two years has expired since the last time that such applicant applied for renewal of his certificate of registration. Therefore, according to Section 10132, supra, he must pass a satisfactory examination before he can be re-registered, unless the board is empowered to omit the period of time spent in the military service and conclude that it has been less than two years since the last time the applicant registered.

It is a well established principle of law that a board, bureau or commission, which is created by statute, has only such powers conferred by the statute. In this connection we cite the case of Federal Trades Commission v. Raladam Co., 283 U.S. 643, 75 L. Ed. 1324, 51 S. Ct. 587, 79 A.L.R. 1191, in which respondent was charged by the Federal Trades Commission with using unfair methods of competition. Justice Sutherland, of the United States Supreme Court, in defining the limitation on official powers, said the following at A.L.R. 1. c. 1197:

"* * * Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

The principle of law stated in the Raladam case, supra, would also apply to the exercise of official powers by state officers.

In Fort Worth Cavalry Club v. Sheppard, 125 Texas 339, 83 S.W. (2d) 660, there was a proceeding in mandamus to compel the Comp-

troller to issue a state warrant for a certain sum of money. The court, in defining the powers and duties of public officers, said at S.W. 1. c. 663:

"All public offices and officers are creatures of law. The powers and duties of public officers are defined and limited by law. By being defined and limited by law, we mean the act of a public officer must be expressly authorized by law, or implied therefrom. * * * * *

The board of examiners is provided by statute in Section 10128, R. S. Mo. 1939, reading as follows:

"A board of examiners, to consist of three persons, citizens of this state for at least five years prior to their appointment, is hereby created to carry out the purposes and to enforce the provisions of this chapter. Such board shall be appointed by the Governor, by and with the advice and consent of the senate: Provided, that all members must have been registered and practicing barbers in this state the last five years next preceding their initial appointment. Each member of said board shall serve for a term of four years and until his successor is appointed and qualified. Said board shall, with the approval of the State Board of Health, prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious or contagious diseases. A copy of such rules shall be posted in a conspicuous place in every barber shop, barber school or barber college in this state. Each barber to whom a certificate of registration is issued must be examined at least once a year and as often thereafter as the board may deem necessary, by a licensed physician duly designated by the state board of health to make such examinations, to ascertain the fact that such barber is free from infectious or contagious diseases, and is not afflicted with any physical or mental ailment which would render him unfit to practice the occupation of barbering. Each member of

said board shall, before entering upon the discharge of his duties, give a bond in the sum of fifteen thousand dollars, with a duly authorized surety or bonding company, to be approved and filed by the Secretary of State, conditioned for the faithful performance of his duties, and shall take oath provided by law for public officers. Vacancies upon said board caused by death, resignation or expiration shall be filled by appointment by the Governor."

The members of said board are public officers and can only act with the power and authority conferred by statute.

In certain instances the General Assembly has passed amendments permitting persons to obtain certificates of registration without being penalized where they have not procured the certificates within the prescribed time due to being in the military service.

For example, Section 16, Laws of Missouri 1941, page 663, empowered the State Board of Registration for Architects and Professional Engineers to issue a certificate of registration to those persons who applied within one year after the act became effective, who paid a fee of \$25.00, and who had certain stipulated qualifications, and such persons were not required to take an oral or written examination.

The 62nd General Assembly passed an act to amend Section 16, supra, which was approved August 2, 1943, and added the following provision:

"* * * Provided, however, that any architect or professional engineer who has been prevented from obtaining such certificate of registration within the period of one year after the effective date of this Act, because of service with the Armed Forces during such period, shall have one year after the official termination of the war to obtain such certificate without oral or written examination."

In the instant case the Legislature has passed no legislation similar to that just cited that would give the Board of Examiners the power to issue a renewal certificate of registra-

tion where the applicant has not applied for the certificate within the statutory time because of being in the military service.

We readily recognize the hardship imposed on the applicant in the absence of such legislation, but, under the facts and circumstances presented, such applicant cannot be issued a renewal certificate of registration without first passing a satisfactory examination.

Conclusion

It is, therefore, the opinion of this department that a person, who has failed to procure a renewal of his certificate of registration as a barber for a period exceeding two years, must pass a satisfactory examination before he can be re-registered. This is required by Section 10132, R. S. No. 1030, and the time spent in the military service must be counted in determining if the period exceeds two years.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:CP

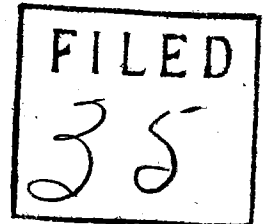
SCHOOLS:
AND STATE:

RE: The Washington Technical School of St. Louis, Mo. in operating a barber school is subject to the provisions of Sec. 10134, R. S. Mo. 1939. The Board of Barber Examiners is authorized to refuse permission to take barber examinations to persons who have not graduated from a licensed barber college, if said persons are attempting to qualify under the provision of Section 10133, R. S. Mo. 1939, that they have attended a properly appointed and conducted barber school for a certain length of time.

July 5, 1946

Mr. J. C. Green,
Secretary
State Board of Barber Examiners
St. Louis 2, Missouri

7/16



Dear Mr. Green:

This will acknowledge receipt of your letter of June 27, 1946, in which you request an opinion of this department as follows:

"Section 10134 of the Revised Statutes of Missouri, provides for the license and regulation of Barber schools and colleges in this state. Washington Technical school of St. Louis, Missouri, is operating a Barber school. This school has one instructor and ten students. This school is operated as a colored school. This school does not have any license as a barber school, altho the instructor does have an instructors license.

"Will you please advise our board if this school is subject to the provisions of the above mentioned section; and if our board is justified in refusing graduates of said school permission to take the barber examination."

In your letter you refer to Section 10134, R. S. Mo. 1939, requesting us to advise whether the Washington Technical School of St. Louis, Missouri, is subject to the provisions of that section. Section 10134, supra, reads as follows:

"Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber: Provided, that in no barber shop shall

there be more than one apprentice to two barbers authorized under this chapter to practice said occupation; but all barber shops having but one chair shall be entitled to one apprentice; that all barber schools and colleges shall have not less than one teacher or instructor for every ten students: Provided, that all barbers, or barber schools or colleges, who shall take an apprentice or student, shall immediately file with said board the name and age of each of such apprentice or students, and the said board shall cause the same to be entered in a register kept for that purpose; for which registration a fee of five dollars shall be paid to the treasurer of the board by such apprentice or student: Pro-
vided, that any firm, corporation or person, desiring to conduct a barber school or college in this state, shall first secure from said board a permit to do so, and shall keep the same prominently displayed. For such permit there shall be paid to and collected by said board an annual fee of one hundred dollars to be paid on or before January 31st of each year: Provided further, that said board shall have the right to pass upon the qualifications, appointments, and course of study in said college or barber shops where apprentices are taught the occupation of barbering; and pro-
vided further, that said board shall have the right and power to revoke the certificate, permit or license of any such barber school or college, instructor or teacher therein or instructor in any barber shop, for any violation of the provisions of this section. R. S. 1929, Sec. 13259. Reenacted, Laws 1937, p. 186."

By its terms, this section applies to all barber schools in this state. There is no exception contained in that section or in Chapter 67, R. S. Mo. 1939, which relates to the State Board of Barber Examiners, that exempts any barber school or college whatsoever. We think, therefore, that Section 10134, supra, applies to the Washington Technical School of St. Louis, Missouri.

The answer to the question which you raised regarding your justification in refusing graduates of this school permission to take the barber examination depends upon a construction of Section 10133, R. S. Mo. 1939, which reads as follows:

"Any person not following the occupation of

barbering at the time this chapter goes into operation, desiring to obtain a qualified certificate of said occupation in this state, shall make application to said board therefor and shall pay to the treasurer of said board an examination fee of ten dollars, and shall present himself at the next regular meeting of the board, for examination of applicants, whereupon said board shall proceed to examine such person, and, being satisfied that he is above the age of nineteen years, of good moral character, free from contagious or infectious diseases, has either studied the trade for two years as a registered apprentice, under a qualified and practicing barber, or studied the trade for at least 1000 hours over a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor, who is licensed as such by the State Barber Board of Missouri; and an additional eighteen months as a registered apprentice under a qualified and practicing barber, or practiced the trade in another state for at least two years and is possessed of requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, haircutting and all of the duties and services incident thereto and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade, shall enter his name in the register hereinafter provided for, and shall issue to him a certificate of registration, authorizing him to practice said trade in this state: Provided, that whenever it appears that an applicant has acquired his knowledge of said trade in a barber school or college, the board shall be judges of whether said barber school or college is properly appointed and conducted and under proper instructions to give sufficient training in said trade. Any person desiring to teach barbering in this state in a barber school, college or barber shop must first make application to appear before said board for an examination as a teacher or instructor in said occupation and shall pay to the treasurer of said board an examination fee of \$25.00, whereupon said board shall proceed to examine such applicant and after finding that he is duly qualified

to teach said occupation, said board shall issue to him a certificate of registration entitling him to teach barbering in this state, subject to all the provisions of this chapter."

Section 10133, supra, sets out the qualifications which shall be satisfied by the applicant for a barber's license, one of which is that the applicant shall have studied the trade for two years as a registered apprentice of a qualified and practicing barber or that he shall have studied the trade for at least one thousand hours over a period of not less than six months in a "properly appointed and conducted barber school" under the direct supervision of an instructor who is a licensed barber. From your letter we assume that the applicants from the Washington Technical School are able to satisfy the requirements set out in Section 10133, supra, in all respects with the possible exception that they do not come from a school which would properly accredit them to take the examination. The question, therefore, is whether the Washington Technical School is a properly accredited school. This, in turn, depends upon the meaning of the words "properly appointed and conducted barber school".

Section 10134 requires that barber schools and colleges be licensed and properly conducted. It places the supervision of the conduct and the appointments of the schools within the discretion of the Board. Statutes in pari materia must be construed together. Their provisions must be harmonized, if possible, so as to accomplish the legislature's central idea and intent. *Hull v. Baumann*, 131 S. W. (2d) 721, 345 Mo. 159; *State ex rel. Lefholz*, 95 S. W. (2d) 1239, 231 Mo. App. 870.

The words of Section 10133, supra, could refer only to the colleges controlled and licensed by the Board under Section 10134, supra. Those complying with the terms of Section 10134, supra, are the only ones which could be "properly appointed and conducted" according to the Missouri statutes.

This interpretation is in accord with the general intention of the Legislature as indicated by these two sections of the statute, i. e., that all barber schools were to be licensed and designated as such by the Board and that all barbers that were licensed were to meet high qualifications with regard to their trade. This strict supervision of the barber trade was the purpose of the statutes dealing with this subject. *State ex rel. Allen v. Davis* (1938 Mo. App.) 119 S. W. (2d) 844. To hold that students who had graduated from a school which had not met the requirements of the statute relating to barber schools and colleges could be permitted to practice their trade in Missouri would be to defeat the regulatory purpose of the statutes.

Mr. J. C. Green

-5-

It is, therefore, the opinion of this department that, (1) Section 10134, R. S. Mo. 1939, is applicable to the Washington Technical School of Missouri in so far as it is operating a barber school. (2) The State Board of Barber Examiners is justified in refusing graduates of the Barber School of Washington Technical School of St. Louis, Missouri, the permission to take the barber examination.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

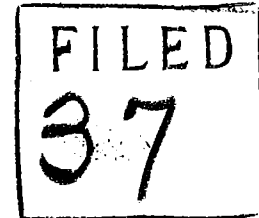
APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

CHIROPODY: Unlawful to administer foot treatments as defined in Section 9796, R.S.Mo. 1939, without a chiropody license. Unlawful to advertise, using title or chiropodist or other similar designations, if not a licensed chiropodist.

July 31, 1946



Dr. L. A. Hansen, D.S.C.
Secretary State Board of Chiropody
702 Shukert Building
Kansas City, Missouri

Dear Sir:

Your letter has been received requesting an official opinion and which reads as follows:

"As Secretary of the State Board of Chiropody, I shall appreciate it very much if you will give an official opinion on the following questions:

"1. Is it unlawful for a person without any kind of a license to treat the foot by means of a surgical instrument, manipulate the foot with the hand or by the use of a vibrator, massage the foot or leg, use straps, or to apply drugs on the foot or leg, whether or not he collects a fee?

"2. Is it unlawful for a person without any kind of a license to advertise or list himself as a chiropodist, podiatrist, cuboid specialist, foot correctionist, foot specialist, foot expert, or any other name that would lead the public to believe that he has a special knowledge regarding the foot without having a chiropody license?"

You have propounded two questions for our opinion, and we shall endeavor to answer them in order.

In considering the first question we must look to the statute defining the word "chiropody". Section 9796, R.S.Mo. 1939, provides as follows:

"The definition of the word 'chiropody' shall, for the purpose of this article, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and

massage in connection therewith except amputation of the foot or toes, or the use of anaesthetics other than local, or the use of drugs or medicine other than local antiseptics."

Comparing the types of treatment described in your letter in connection with your first question, with the definition of the word chiropody, as set out in the statute, we believe that administering such described treatment would constitute the practice of chiropody.

Senate Bill 433, relating to the practice of chiropody, was passed by the 63rd General Assembly, and is now in effect. This bill transferred to the newly created State Board of Chiropody certain powers relating to the licensing and registration of practitioners of chiropody heretofore vested in the State Board of Health.

Section 9798, Senate Bill 433, Mo. R. S. A., June, 1946 Pamphlet, relating to the licensing and registration of persons desiring to practice chiropody, provides:

"Any person desiring to practice chiropody in this state, shall furnish the State Board of Chiropody with satisfactory proof that he or she is twenty-one years of age or over, and of good moral character, and a citizen of the United States, and that he or she has received at least four years of high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from a reputable school of chiropody conferring the degree of D.S.C. (doctor of surgical chiropody) and recognized and approved by the State Board of Chiropody, having a minimum requirement of three scholastic years and one year in an accredited college, or four years in a recognized and reputable chiropody college. Upon payment of a fee of thirty-five dollars (\$35.00) to the Director of Revenue, and making satisfactory proof as aforesaid, the applicant shall be examined by the State Board of Chiropody, or a committee thereof, under such rules and regulations as said board may determine, and if found qualified, shall be licensed to practice chiropody and registered, and shall receive in testimony thereof a certificate signed by the president and secretary of the board; Provided, that the State Board of Chiropody, may, under regulations established by the board, admit without examination legally qualified practitioners

of chiropody who hold certificates to practice chiropody in any state or territory of the United States or the District of Columbia with equal educational requirements to the State of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying to the State Board of Chiropody a fee of one hundred dollars (\$100.00)."

Section 9807, Senate Bill 433, Mo. R. S. A., June, 1946 Pamphlet, makes it unlawful for any person to practice chiropody without having registered, and provides as follows:

"Any person who shall practice chiropody in this state without having registered as provided in this act shall upon conviction be adjudged guilty of a misdemeanor."

Therefore, in answer to the first question it is our opinion that it would be unlawful for any person to administer the treatment described in numbered paragraph one of your letter if he were not licensed and registered as provided by law. It would not make any difference whether or not any fees are collected in connection with administering such treatment.

In connection with your second question relating to a person, unlicensed to practice chiropody, advertising himself as a chiropodist, podiatrist, cuboid specialist, foot expert, foot correctionist, foot specialist, etc., your attention is directed to Section 9801, R. S. Mo. 1939, which provides:

"It shall be deemed prima facie evidence of the practice of chiropody, or of holding oneself out as a practitioner within the meaning of this article, for any person to treat in any manner the human foot by medical, mechanical or surgical methods, or to use the title 'chiropodist' or 'registered chiropodist,' or any other words, or letters, which designate, or tend to designate, to the public that the person so treating or holding himself or herself out to treat, is a chiropodist." (Emphasis ours)

Under this section, any person advertising himself or holding himself out to the public by using any of the titles listed above, or other words or titles which may designate or tend to designate to the public that he is a chiropodist would constitute prima facie evidence of his holding himself out as a practitioner of chiropody.

Section 9800, R. S. Mo. 1939, in part, provides:

"* * * and any person not being lawfully authorized to practice chiropody in this state and registered as aforesaid, who shall advertise as a chiropodist, in any form, or hold himself out to the public as a chiropodist, shall, upon conviction thereof, for each offense be punished by a fine of not less than one hundred nor more than two hundred dollars, or by imprisonment for not less than three months nor more than one year, or by both such fine and imprisonment. * * *" (Emphasis ours)

Therefore, in answer to the second question, it is our opinion that it would be unlawful for a person, unlicensed to practice chiropody in the state, to advertise himself in the manner herein described.

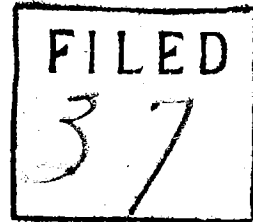
Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: Under House Bill No. 770, county court issues warrant to pay clerk hire.



August 9, 1946

8/20

Honorable Willis T. Harbison
Plattsburg, Missouri

Dear Sir:

We are in receipt of your inquiry in which you ask for a construction by this office of that part of House Committee Substitute for House Bill No. 770 relating to traveling expenses and clerical hiring, and particularly as to that part of said bill which states, "The county treasurer shall upon presentation of a proper bill by such clerical employee * * * draw a warrant each month for payment of same out of moneys provided by the state for such purpose." You also state your "County Treasurer seems to think he does not have a right to draw a Warrant on himself."

In order to properly value the question raised, it is necessary to get at what was the legislative intent in the passage of this law and each part thereof. To do so, we must examine other related statutes which were on the statute books when this bill was enacted by the Legislature.

Section 13824, R.S. Mo. 1939, provides:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; * * *"

Section 13825, R.S. Mo. 1939, is as follows:

"When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus:

"A v. _____ county. The account of A B for the sum of _____ dollars being

presented and inquired into, it is found by the court that the sum of _____ dollars is due him from the county, payable out of (express the particular fund, as the case may require), and for which the clerk is ordered to issue a warrant.

"When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form:

"Treasurer of the county of _____, pay to _____ dollars out of any money in the treasury appropriated for (express the particular fund, as the case may require). Given at the courthouse, this _____ day of _____, 19____. By order of the county court.

"Attest: C D, clerk. A B, president."

Section 13831, R.S. Mo. 1939, is as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:

"Treasurer of the county of _____: Pay to _____ dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).

"Given at the courthouse, this _____ day of _____, 19____, by order of the county court.

"Attest: C D, clerk. A B, president."

Several sections of the statutes dealing with the duties of the county treasurer are referred to. Section 13798, R.S. Mo. 1939, speaking of his duties, says:

" * * * * He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Section 13805, R.S. Mo. 1939, requires the county treasurer to keep account of all moneys received and disbursed and "regular abstracts of all warrants and scrips drawn on the treasury, and paid or received by him, and shall cancel the same by writing in ink 'paid' across the face thereof, when paid or received."

Sections 13806, 13807, 13808 and 13809, R.S. Mo. 1939, provide for the filing, cancellation, etc., of warrants.

Section 13810, R.S. Mo. 1939, provides as follows:

"Any county treasurer or county clerk violating the provisions of sections 13807 to 13809, inclusive, shall be adjudged guilty of a misdemeanor, and shall be fined a sum not less than five nor more than twenty dollars, or shall be imprisoned in the county jail for not less than thirty days for each offense."

Section 13811, R.S. Mo. 1939, provides the treasurer shall make duplicate receipts and keep his books open to the inspection of the county court.

Section 13813, R.S. Mo. 1939, requires the county treasurer to "furnish an account of the receipts and expenditures of the county" as often and in such manner as may be required by the county court.

The above-mentioned statutory provisions definitely show that the Legislature has set up a detailed plan of handling the county money and thrown valuable safeguards about both the public conduct in the handling of public funds and the preservation of the proof thereof.

The funds that under House Committee Substitute for House Bill No. 770 are paid by the state to be used for clerk hire are paid into the county treasury. They could not be paid out of the county treasury unless they were paid into the county treasury. They are not disbursed by the State Board of Education directly to the clerks. When so paid into the county treasury, they thereupon become part of the county money. The same rules that apply to protecting other county money, on reason apply to protecting those funds. To hold otherwise would compel an unreasonable construction of said House Bill and would force the conclusion that while the Legislature has placed the above set forth safeguards about part of the county money, that as to another part of said county money said safeguards shall not apply, and that, as to the latter, the county treasurer shall "draw a warrant" on himself for the payment of such funds. That course would be revolutionary and would discard the checks and balances so systematically required in handling all other county money and would be a temptation to lax and unjustified conduct.

In *State v. Hackmann*, 258 S.W. 1011, 302 Mo. 558 (1924), our Supreme Court, en banc, held that an appropriation for aid to the schools which stated Article VI meant Article IV, and said, *l.c.* 1011:

"The fundamental rule to be observed is to ascertain and give effect to the purpose of the Legislature. Under that rule the court may reject words and figures when necessary to give effect to the manifest intention of the framers of the statute. *State ex rel. v. Koeln*, 278 Mo. loc. cit. 41, 211 S.W. 31; *Lincoln University v. Hackmann* (Mo. Sup.) 243 S.W. 320; *State v. Finkelstein*, 269 Mo. 631, 191 S.W. 1002; *St. Louis v. Hurta*, 283 Mo. 77, 222 S.W. 430; *State v. Gmelich*, 208 Mo. 152, 106 S.W. 618; *State ex rel. v. McQuillin*, 246 Mo. loc. cit. 534, 152 S.W. 347; *State ex rel. v. Amick*, 247 Mo. loc. cit. 291, 152 S.W. 591; *Curtis v. Sexton*, 252 Mo. loc. cit. 245, 159 S.W. 512.

"In construing a statute, the legislative intent is to be determined from a general view of the whole act, with

reference to the subject-matter to which it applies, and the particular topic under which the language in question is found.' 36 Cyc. 1123."

It is a well recognized rule of law that the courts will, by construction, correct errors in statutes in the use of words where it appears that such correction is necessary to give proper meaning to the statute being considered. In 59 C. J., page 991, par. 591, the law is thus stated:

"More verbal inaccuracies, or errors in statutes in the use of words, * * will be corrected by the court, whenever necessary to carry out the intention of the legislature as gathered from the entire act. * * * *"

Viewing House Committee Substitute for House Bill No. 770 from its four corners and considering it as a whole, it is apparent that the Legislature intended to keep the proper safeguards about all the county money in each instance in said bill, except the matter here being considered. Said bill particularly sets forth the approved methods heretofore followed in getting the approval of the higher officials and making the record in the county court and having the bills audited and paid by warrants.

By construing the word "draw," as used in line 20, Section 2 of said bill, to mean "pay," we believe the legislative intent will be carried out. Said section, in terms, provides that said bill shall be a "proper" bill; that it must have been approved by the county superintendent; and that it must have been "audited" by the county court. It is a demand against the county, although it is payable out of that part of the county funds that are paid to the county by the State Board of Education.

Section 13324, supra, authorizes the county court to audit, adjust and settle and order payment of the same on all county bills. Section 13331, supra, provides that the county court "shall order its clerk to issue therefor a warrant" for payment of county bills after the county court has determined that the bill is a proper charge. Section 13798, supra, requires the county treasurer to receive and disburse all county moneys, and requires him to disburse the same on warrants drawn by order of the county court.

In order to hold that county money can be withdrawn in some other fashion than by county warrants from the county treasury, it would be necessary to hold that said House Committee Substitute for House Bill No. 770, by implication repealed to that extent this section of the statutes, and repeals by implication are not favored by the law. Said House Bill No. 770 must be interpreted in the light of and with reference to the other related statutes. The Legislature, of course, knew that the above set forth statutes were on the books and would be considered in arriving at the legislative intent and meaning of said bill.

Conclusion.

It is our opinion that the proper procedure in paying for clerical hire, under the provisions of Section 2 of House Committee Substitute for House Bill No. 770, is for the creditor clerk to make out a proper bill and get the county superintendent to endorse thereon his approval of the same and the date of said approval; present same to the county court who audit, settle and adjust it, as they do any other county bills and make the usual records thereof, order a warrant drawn by the county clerk on the county treasury therefor and deliver it to the creditor clerk who will present it to the county treasurer who thereupon pays said warrant and treats said canceled warrant the same way that other warrants are required by the statute to be treated with reference to bookkeeping, cancellation and custody.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

COUNTY OFFICERS.

Compensation of various county officers to be received for performance of their duties as members of the county board of equalization.

August 13, 1946

FILED

37

Hon. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

We acknowledge receipt of your letter of July 31, 1946, requesting an official opinion of this office, and reading as follows:

"The Board of Equalization has been meeting here and the clerk of the county court has filed asking for remuneration for his services on said board. Will you please inform me whether he is entitled to charge for his services on and to said board? Also, what members of the board are entitled to remuneration?"

Section 11008 of House Bill No. 467, which is now a law, provides as follows:

"The judges of the county court, the county surveyor, the county assessor, the sheriff, the county clerk, and those sitting as members as may otherwise be provided, shall receive five dollars per day for each day they shall be present and act in the performance of their duties as members of the county board of equalization. Provided, that the above county officers who are now or may hereafter be compensated by salary shall not be entitled to the compensation provided in this section."

This office rendered an official opinion on July 16, 1946, a copy of which is enclosed, in which it was held that the mem-

bers of the county court of third class counties are allowed \$5.00 per day for each day they act in the performance of their duties as members of the county board of equalization, and also that sheriffs of third class counties under township organization are entitled to compensation, as provided in Section 11008 of House Bill No. 467. The sheriffs were held to be entitled to the fees for serving as members of the county board of equalization because of the fact that only part of the compensation they received for their duties as sheriffs was received as salary and part of the compensation was received as fees.

Section 2 of House Bill No. 891, which is now a law, provides as follows:

"The county assessor in counties of the third class shall receive \$5.00 per day for each day he shall serve as a member of the county board of equalization."

Section 1 of House Bill No. 805, which is now a law, provides as follows:

"County surveyors in counties of the third class shall be allowed fees for their services as follows: * * * * *

"For each day actually engaged in serving as a member of the county board of equalization..... 5.00"

In the case of the other member of the board of equalization, that is, the county clerk, the fact which determines whether or not such officer shall receive the fee as provided for in Section 11008 of House Bill No. 467, depends on whether he is compensated by salary alone or compensated both by salary and fees.

Section 11238 of House Bill No. 535, which is now a law, provides as follows:

"except in counties having a population in excess of 100,000, the following fees and compensation shall be allowed to the several officers and persons herein named for services rendered under the provisions of this chapter, viz.:

"I. To clerks.--To the clerk of the county court, for extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each.

"II. For making a copy of the tax book for the use of the collector, including certificate and seal to the same, for every hundred words and figures, ten cents, one-half to be paid by the state, the other half by the county; for making an abstract of the assessor's book for the State Tax Commission, five dollars, and in addition thereto fifty cents for every one hundred thousand dollars' worth of property on such abstract, to be paid by the state.

"III. For making an abstract of the tax book for the director of revenue, including certificate and seal to same, five dollars, and one-tenth of one per cent of the amount of revenue tax on such abstract to be paid by the state.

"IV. For certifying statements to the director of revenue, as required by this chapter, or making any certificate required by this chapter, under the seal of said court, seventy-five cents for each certificate and seal, to be paid equally out of the state and county treasury.

"V. For every settlement with the collector, thirty-five cents, to be paid equally out of the state and county treasury.

"VI. For safe-keeping, filing and transmitting the collector's bond to the State Tax Commission, one dollar.

"VII. For filing, preserving and safekeeping of the assessment lists, one-half of one cent per list, to be paid one-half by the state and one-half by the county."

Section 13828, R. S. Mo. 1939, provides:

" * * * For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, * * *."

It can be seen from the above that the county clerk receives fees in addition to his salary.

Since it is specifically provided that the assessor and surveyor shall receive the fee for serving as members of the board of equalization, and since the county clerk is compensated, in part at least, by fees, it is clear that each one is entitled to his fee as provided in Section 11008 of House Bill No. 467, for each day he shall be present and act in the performance of his duty as a member of the county board of equalization.

CONCLUSION

The judges of the county court, the county surveyor, the county assessor, and the county clerk in counties of the third class not under township organization are allowed the fees provided for in Section 11008 of House Bill No. 467 for their services as members of the county board of equalization.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

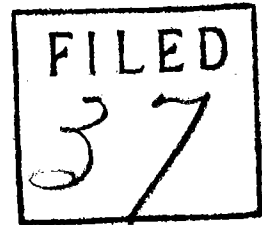
APPROVED:

J. E. TAYLOR
Attorney General

CCB:HR

CHIROPODY: A certificate to practice chiropody issued by the State Board of Health is valid. Licensee, now a resident of Missouri, is entitled to a certificate for ensuing year upon making proper application and paying the required fee.

August 30, 1946



Dr. L. A. Hansen, D. S. C.
702 Shukert Building
Kansas City, Missouri

Dear Sir:

Receipt is acknowledged of your letter requesting an official opinion which reads as follows:

"Enclosed you will find a reciprocity application for chiropody of Manuel Sam Kahn and a letter from the State Medical Board of Ohio.

"Soon after the State Board of Chiropody was formed after July 1, 1946, I received a letter from Manuel Sam Kahn stating that his name has been misspelled on his license, and asked the Board to issue him a new one. Upon investigation, you will notice that the State Board of Health has never approved or signed his application for reciprocity. You will also notice in the letter from the State Medical Board of the State of Ohio that they have not entered into reciprocal relations with the limited practitioners of chiropody, and that in our law, we can reciprocate only with those who reciprocate with us.

"I should like to get your opinion as to what action the Board should take upon this matter."

An examination of the enclosed application submitted by Mr. Kahn discloses that a certificate to practice chiropody in this state was issued to him on January 21, 1946, which apparently is the one that has his name misspelled. The fact that the certificate was issued indicates that Mr. Kahn's application was properly examined and approved by the State Board of Health, and the omission of the date of approval and signature of the Secretary of the Board would not in itself be so vital as to render the certificate issued invalid. We therefore must determine whether or

not the certificate which he now holds is invalid for some other reason.

When the certificate was issued the State Board of Health was governed by the provisions, relating to admission of persons from other states to practice chiropody in this state, appearing in Section 9798, Laws of Missouri 1943, page 582 which, in part, provides:

"# * Provided, that the state board of health may, under regulations established by the board, admit without examination legally qualified practitioners of chiropody who hold certificates to practice chiropody in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying to the state board of health a fee of fifty dollars(\$50.00)."

In reading the above section we ascertain that three requirements had to be met before the State Board of Health could exercise its discretion to admit a nonresident applicant to practice chiropody in this state without requiring him to take an examination.

He had to hold a certificate to practice in the state, territory or District of Columbia from which he sought admission, such state, territory or District of Columbia had to have educational requirements equal to those of the state of Missouri and that state, territory or District of Columbia had to extend like privileges of reciprocity to qualified practitioners from this state.

Mr Kahn's application shows that he held a certificate to practice chiropody in the State of Ohio granted by the Ohio State Medical Board.

Sections 1274-5 and 1270 of Throckmorton's Ohio Code Annotated provides for the educational qualifications necessary to procure a certificate as a limited practitioner, which includes chiropodists, and such qualifications were equal to the educational requirements of this state at the time the State Board of Health issued a certificate to practice to Mr. Kahn.

In determining whether or not the State of Ohio extended reciprocity privileges to chiropodists of this state when the certificate in question was issued, we again must look to the Ohio Statutes. Section 1274-1, Throckmorton's Ohio Code Annotated

defines limited branches of medicine to include chiropody. Section 1274-4 of the Ohio Code provides when the State Medical Board may dispense with the examination of applicants for limited certificates and reads as follows:

"When board may dispense with examination--
The State Medical Board may dispense with the examination of applicants for such limited certificates upon the same reciprocal terms and conditions with respect to such limited branches as are provided in Section 1282 of the General Code with respect to physicians and surgeons generally."

Reference is made in the above section to Section 1282 which reads, in part, as follows:

"Admission of physicians, surgeons, osteopathic physicians and surgeons, and osteopaths, of other states; fee for registration.--
When a physician or surgeon licensed by the licensing department of another state, a territory or the District of Columbia, or a diplomate of the national board of medical examiners or the national board of examiners for osteopathic physicians and his profession, the state medical board may, in its discretion, issue to him a certificate to practice medicine or surgery, osteopathic medicine and surgery, or osteopathy in Ohio without requiring the applicant to submit to examination, * * *"

Under the above sections a practitioner of chiropody in Missouri, possessing the necessary qualifications, could be admitted to practice in Ohio without first taking an examination. However, the admission of an applicant is clearly left up to the discretion of the Ohio State Medical Board. Such was the law when the Missouri State Board of Health issued a certificate to Mr. Kahn in January of this year.

Although the letter which you have enclosed from the Ohio State Medical Board strongly indicates that that Board would not extend reciprocity privileges to practitioners of chiropody in this state now, there is nothing conclusive to show that they would not have done so at the time a certificate was issued to Mr. Kahn. The Ohio laws permitted them to do so and apparently the Missouri State Board of Health had not been informed that reciprocity privileges would not be extended to Missouri practitioners. Therefore, it is our notion that there is no legal basis upon which to question the

validity of the certificate issued by the Missouri State Board of Health to the licensee on January 21, 1946. However, if the Ohio State Medical Board chooses to deny reciprocity privileges now or in the future to chiropodists of this state the Missouri State Board of Chiropody could not extend such privileges to practitioners in Ohio who may seek admission to practice in this state.

We therefore conclude that Mr. Kahn is now a resident of Missouri and is practicing chiropody in the City of St. Louis under a valid certificate.

Section 9798a of Senate Bill No. 433 in part provides:

"Every person duly licensed to practice chiropody in this state shall, on or before the 31st day of October in the year in which this act becomes effective and annually on or before the 31st day of October of each year thereafter, apply to the State Board of Chiropody for a certificate of registration for the ensuing year, which application shall be made on a form to be furnished by the board, * * *"

* * * * *

"* * *The State Board of Chiropody shall on or before the 1st day of October in each year mail to each person licensed to practice chiropody in this state at the last known office or residence address of such person a blank form for application or registration. * *"

Section 9798b of Senate Bill No. 433 in part provides:

"Upon due application therefor and upon submission by such person of evidence satisfactory to the State Board of Chiropody that such person is licensed to practice chiropody in this state, and upon the payment of the fees required to be paid by this act, the State Board of Chiropody shall issue to such applicant a certificate of registration under the seal of said board, which certificate shall recite that the person therein named is duly registered for the year specified. * * *"

The fact that the licensee's name is misspelled would not require

the Board to issue a new license. We believe that the proper procedure would be to send the licensee a blank form for registration on or before October 1, 1946, so that he may apply for a certificate of registration on or before October 31, 1946, for the ensuing year. Such is the procedure prescribed in Section 9798a supra. When the licensee submits the application in proper form and pays the required fee a certificate of registration for the ensuing year should be issued to him as provided in Section 9798b supra.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:mw

CHIROPODY: In Re: Qualifications for taking chiropody examinations
given by State Board of Chiropody.

October 10, 1946

FILED

37

10-16

Dr. L. A. Hansen, D. S. C.
Secretary, Missouri State Board of Chiropody
702 Shukert Building
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an
official opinion which reads:

"The State Board of Chiropody wishes for you to
give an opinion on the following question:

"At an official meeting of the State Board of
Chiropody which was held at Jefferson City,
Mo. on September 15, 1946, Dr. Wm. W. Potter
appeared before the Board asking if he could
take the chiropody examination at the next
Board meeting.

"Dr. Potter was graduated at the Illinois
College of Chiropody in 1938. His course
consisted of three years. He took the
Kansas Board in 1938 and practiced in
Kansas until April of 1942 when he entered
the Navy and was discharged in April 1946
with a rank of Senior Lieutenant. In the
summer of 1945, he took the examination in
North Carolina. The State of Kansas does
not have a reciprocity law and North
Carolina refuses to reciprocate with
Missouri. At the time that Dr. Potter was
graduated, the law in Missouri required only
two years, of chiropody college. The State
Board of Chiropody wishes to give the exam-
ination to Dr. Potter, but we hesitate to
give it to him inasmuch as the law now states
four years.

"I shall appreciate your opinion upon this
matter."

The only question involved is whether or not Dr. Potter possesses the necessary qualifications to take the examination given by the State Board of Chiropractic.

Section 9798 of Senate Bill No. 433, which became effective July 1, 1946, and which is incorporated in the Missouri Revised Statutes Annotated as Section 9798, provides for the necessary qualifications for applicants in order to take the chiropractic examination given by the State Board of Chiropractic, and in part, reads:

"Qualifications--educational requirements--
fee--examination--certificate--admission
without examination

"Any person desiring to practice chiropractic in this state, shall furnish the State Board of Chiropractic with satisfactory proof that he or she is twenty-one years of age or over, and of good moral character, and a citizen of the United States, and that he or she has received at least four years of high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from a reputable school of chiropractic conferring the degree of D. S. C. (doctor of surgical chiropractic) and recognized and approved by the State Board of Chiropractic, having a minimum requirement of three scholastic years and one year in an accredited college, or four years in a recognized and reputable chiropractic college. Upon payment of a fee of thirty-five dollars (\$35.00) to the Director of Revenue, and making satisfactory proof as aforesaid, the applicant shall be examined by the State Board of Chiropractic, or a committee thereof, under such rules and regulations as said board may determine, and if found qualified, shall be licensed to practice chiropractic and registered, and shall receive in testimony thereof a certificate signed by the president and secretary of the board:* * * *"

An examination of the above section discloses that there are five qualifications that the applicant must possess in order to

take the examination:

1. He must be at least twenty-one years of age.
2. He must be of good moral character.
3. He must be a citizen of the United States.
4. He must have had four years of high school or the equivalent thereof.
5. He must have received a diploma or a certificate of graduation from a reputable school of chiropody conferring the degree of doctor of surgical chiropody and recognized and approved by the State Board of Chiropody having a minimum requirement of three scholastic years and one year in an accredited college, or four years in a recognized and reputable chiropody college.

It is the fifth qualification with which we are primarily concerned in the case at hand as we assume that the applicant possesses the other four qualifications. After a careful study we are of the opinion that the fifth qualification actually includes two qualifications or requirements in the alternative, and the possession of either, by the applicant, would be sufficient. We construe the fifth qualification to mean that if the applicant has received a diploma or certificate of graduation from a reputable school of chiropody, which is recognized and approved by the Board and which confers the degree of doctor of surgical chiropody and has a minimum requirement of three scholastic years and one year of college, it would be sufficient, or, if the applicant has received four years of study and training in a recognized and reputable chiropody college it would be sufficient. The use of the word "or" after the word "college" and before the word "four" is as a disjunctive and serves to separate one requirement from the other, thus denoting an alternative and if the applicant possessed either requirement contained in the fifth qualification it would suffice.

In the case of *Dodd v. Independence Stove and Furnace Co.*, 330 Mo. 662, 51 S. W.(2d) 114, the following was said regarding the use of the word "or", at S. W.(2d) 118:

"* * * * While the word 'or' may sometimes be so used, its ordinary use is as a disjunctive 'that marks an alternative generally corresponding to "either," as "either this or that." * * *"

In the case at hand you state that the applicant was graduated from the Illinois College of Chiropody and that his course consisted of three years. This indicates that the Illinois College of Chiropody required at least three scholastic years to finish the course in chiropody. It is also probable that that school required a certain amount of academic college study before students could be admitted to study chiropody. If it required at least one year of college work in an accredited college before a person could be admitted to study chiropody it would fulfill the statutory minimum requirement of three scholastic years and one year in an accredited college as set forth in the fifth qualification of Section 9798, supra.

CONCLUSION

It is, therefore, the opinion of this department that if Dr. Potter has received a diploma or certificate of graduation from a school of chiropody conferring the degree of doctor of surgical chiropody which is registered and approved by the Board and which had a minimum requirement of at least three scholastic years and one year in an accredited college, he would be eligible to take the examination, provided he possesses the other qualification set forth in Section 9798 of Senate Bill No. 433, Missouri Revised Statutes, Annotated.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

RFT:mw

CORONER

re: Entitled to receive salaries under House Bill No. 880 from October 6, 1946.

FILED

37

December 18, 1946

Honorable ~~Leg~~ J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

Receipt is acknowledged of your letter which reads:

"Will you please inform me when the coroner in counties of the third class go on salary?"

Section 1 of House Bill No. 880 incorporated in the Missouri Revised Statutes Annotated as Section 13259.4, relating to the compensation of coroners in counties of the third class provides:

"The coroner in all counties of the third class shall receive for his services annually, payable out of the county treasury in equal monthly installments the following: In counties with a population of less than 10,000 the sum of \$120.00; in counties with a population of 10,000 and less than 15,000, the sum of \$180.00; in counties with a population of 15,000 and less than 20,000, the sum of \$240.00; in counties with a population of 20,000 and less than 24,000 the sum of \$360.00; in counties with a population of 24,000 and less than 30,000 the sum of \$480.00; and in counties having a population of 30,000 and more the sum of \$600.00."

House Bill No. 880 was truly agreed to and finally passed prior to July 8, 1946, and was subsequently approved by the Governor. The General Assembly recessed July 8, 1946, until twelve o'clock August 7, 1946. Before recessing they passed a joint resolution under the terms of which all laws passed by the General Assembly on or before July 8, 1946, and not effective by special provision, shall take effect ninety days from and after

the beginning of such recess. This was in consonance with Section 29, Article III of the Constitution which, in part, reads:

"* * *provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Therefore, House Bill No. 880 became effective October 6, 1946.

Prior to the passage of House Bill No. 880, supra, coroners in the various counties of this state were compensated by fees collected under Section 13424, R. S. Mo. 1939.

Section 2 of House Bill 880 requires the coroner in third class counties to collect the fees accruing to his office by law, and at the end of each month file with the county court a report of all fees charged and collected during said month. Upon the filing of such report the coroner must forthwith pay to the county treasurer the fees collected.

Therefore, the effect of House Bill No. 880 is to change the manner of compensating coroners in third class counties from fees to salaries.

Section 13, Article VII of the Constitution, in part, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office, * * *"

The appellate courts of Missouri have not ruled on the status of a coroner other than holding he is a "constitutional officer" but other jurisdictions have held that the office of "coroner" is a county office, and that the coroner is a county officer. *People v. Horan*, 86 Pac. 252, 34 Colo. 304; *People v. Warner*, 104 N.Y.S. 279; *Abbott v. Adams County*, 214 Ill. App. 201.

If the salaries that coroners of third class counties are to receive under House Bill No. 880 would constitute an increase in compensation during their present terms of office, said bill would not be applicable to such officers until the beginning of their next ensuing terms. If the salaries so provided do not constitute an increase in compensation during their present terms of office then such officers would be entitled to receive their salaries as of the effective date of said bill.

The question then arises that if the salaries now provided for by House Bill 880 exceed the fees that the coroners have heretofore actually collected and retained as compensation, would it constitute an increase in their compensation during their present terms of office?

The maximum amount of fees that could be retained by coroners in what are now third class counties was fixed by Section 13450, R. S. Mo. 1939 which provides:

"Fees paid to certain officers not to exceed what

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

In the case of State ex rel. Emmons v. Farmer, 196 S. W. 1106, 271 Mo. 306, the validity of an act was questioned which provided that clerks of the circuit courts were to receive an annual salary of \$2,000.00 in lieu of all fees collected. It was contended that said act violated Section 8, Article XIV, of the Constitution of 1875, which is essentially the same as Section 13, Article VII, of our present Constitution, because the salary exceeded the amount of fees which had actually been earned and collected in previous years. There was also an earlier statute which had limited the fees such officers were allowed to retain to \$2,000.00 per annum. The court said the following at l. c. 314, 316 and 317:

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the Act of 1915, does not exceed but exactly equals the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2000 yearly

cash salary, the provisions of the Act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term.
 * * * * *

"The Act of 1915 putting circuit clerks upon a salary basis, was, it is plain, designedly enacted so that the several salaries fixed thereby and made payable monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the Act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from twenty-five to thirty thousand population would get the salary fixed by the Act of 1915 some years, and get fees other years, and it would be impossible ever to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it (State v. Baskowitz, 250 Mo. 82); the other is that where one construction of a statute would render the act absurd and unenforceable and the other the converse, we are required to adopt the latter rather than the former.

(State ex rel. v. Gordon, 266 Mo. 1.c. 411.)

* * * * *

"We are constrained therefore to hold that the Act of 1913 (Laws 1913, p. 702) fixed the basic compensation for clerks of the circuit courts and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations, constitute the salaries from which we are to determine whether the Act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question and conclude that as to the relator there has been no increase and the act is constitutional. Let the judgment of the learned judge nisi be affirmed."

Under the decision of the above case, which we believe is controlling, if the annual salary provided for under the new law does not exceed the maximum amount of fees which could be retained each year, when coroners were compensated by fees, there is no increase in compensation.

In the case at bar Section 13450, supra, allowed coroners an annual retention of fees up to and including \$5,000.00 and the annual salaries provided for in Section 1 of House Bill No. 880, supra, do not even equal that amount, consequently there is no increase in compensation of coroners of third class counties during their present terms of office.

CONCLUSION

Therefore, it is the opinion of this department that coroners in counties of the third class are entitled to receive the salaries provided for in Section 1, House Bill No. 880 as of October 6, 1946, the effective date of said bill.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:mw

MOTOR VEHICLE [REDACTED] be transfer of title at the
time of sale.
CRIMINAL PROCEDURE: [REDACTED] tions regarding jurisdiction
of offenders.

March 1, 1946

FILED

38

Honorable James P. Hawkins
Prosecuting Attorney
Buffalo, Missouri

Dear Sir:

We are in receipt of your request for our official
opinion, as follows:

"I have filed 19 felony charges against
two brothers, and in six of those charges
I have also joined two of their other
brothers. Some of the charges are bur-
glary and larceny while most of them are
for grand larceny of automobiles - in every
car case the boys stole the cars, drove
them awhile, stripped some of them, but
abandoned all of them. I believe that the
facts are such that the felonious intent to
steal can be sustained.

"I would like your opinion of the following
instances as to how to produce sufficient
proof of the ownership of the car:

"(1) The owner had purchased the car the
day that it was stolen - had paid for it but
the title had not been assigned to him, but
he had taken possession of it.

"(2) The owner had the title at the time of
the theft but later sold it and delivered the
title thereto, and, of course, does not have
the title now.

"I would also like your opinion of the means
of procedure in the following cases as per-
tains to two of the defendants who are juve-
niles:

"(1) There was not any showing that they were juveniles; they waived their preliminaries and were bound over to the Circuit Court.

"(2) There was a showing made that they were juveniles; the cases as against them (they being joined under one charge with the others of age); the cases were transferred to the juvenile court; preliminary had as to the other two brothers and they were bound over to Circuit Court."

Your questions will be considered in the order appearing above, and your first question relates to the ownership of motor vehicles in this state.

Section 8382, R. S. Mo. 1939, provides the manner in which title to motor vehicles must be obtained in this state, and after describing the certificate of ownership required, provides:

" * * * It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void. * * * "

The above provision has been the subject of several decisions by the courts of this state, and has been consistently held to be mandatory. In *Drown v. Tough*, 38 S. W. (2d) 736, the Kansas City Court of Appeals, in construing the above quoted statute, said, 1. c. 738:

" * * * It is true the statute relative to the sale or exchange of an automobile is mandatory and must be strictly construed.
* * * "

To the same effect is *State ex rel. Connecticut Fire Ins. Co. v. Argus Cox et al.*, Judges of Springfield Court of Appeals,

306 Mo. 537, a decision by the Supreme Court of Missouri, which, in referring to the above quoted statute, states, l. c. 552:

"Keeping in mind the fact that the Act of 1921, under consideration, is intended primarily as a typical police regulation for the benefit of the public, why should its plain provisions be dispensed with, and something else substituted in its place by judicial construction? When the Act of 1921 became effective, it declared in express terms that a sale of an automobile shall be declared fraudulent and void, unless the vendor attaches his signature to the assignment on the back of his certificate of title, etc. * * * "

In considering the first example contained in your request, in which the owner had purchased the car but had not yet received the assignment of the title to same, it becomes necessary to consider the meaning of the words "at the time of the delivery thereof," contained in the quoted portion of Section 8382, supra. This phrase was discussed in *Saffran v. Rhode Island Ins. Co. of Providence, R. I.*, 141 S. W. (2d) 98, in which the ownership of an automobile was in issue. Portions of that decision which bear on the question at hand are quoted, l. c. 100:

"In the case of *State ex rel. v. Cox et al.*, 306 Mo. 537, 268 S. W. 87, 37 A.L.R. 1456, the court held the sale of a motor vehicle was not effective unless the provisions of the statute, now section 7774, R.S. 1929, Mo. St. Ann. sec. 7774, p. 5193, were complied with. That section provides, among other things, that the certificate of title, duly assigned, shall be delivered to the purchaser 'at the time' the motor vehicle is delivered. The phrase 'at the time' has not been, so far as we are advised, construed by any court in this jurisdiction.

* * * * *

"It has been ruled the phrase 'at any time' does not mean *eo instanti*, 'but the act ought to be done in a convenient time, considering the surrounding circumstances affording evi-

dence of reasonable excuse for delay.'
United States v. Buchanan, D. C., 9 F.
689, 691; Hunter v. Wetsell, 84 N. Y. 549,
38 Am. Rep. 544."

On the authority of this case, it would appear that if the owner referred to by you in your first question procured proper assignment of the title within a reasonable time thereafter, then he may be considered to have been the owner of the motor vehicle referred to at the time of the theft.

Your second question refers to the question of proof of ownership where the owner is no longer in possession of the certificate of title issued by the Secretary of State, as provided in Section 8382, R. S. Mo. 1939, in portions not quoted above because of their extreme length.

We believe this question to be fully answered by the decision of the Supreme Court of this state in State v. Wahlers, 56 S. W. (2d) 26. In that case, which was a criminal prosecution involving the motor vehicle laws, the question of sufficiency of the evidence on ownership of the vehicle concerned was the issue, and we find the following in the opinion of the court, 1. c. 27:

"Defendant's contention, as to the insufficiency of the evidence to sustain a conviction, is mainly based upon the theory that the ownership of the automobile should have been proven by the records of the motor registration department of the state. In other words the ownership should have been proven by a certificate of title issued by the state department. C. E. Bodine testified that the Master Six Buick in question was his property. This evidence was sufficient to establish the fact of ownership. * * * "

This appears to fully answer your question regarding the manner of proving ownership of the vehicles concerned.

The second part of your request relates to criminal procedure affecting juveniles, and in your first example the juveniles involved waived preliminary hearings before a magistrate and were bound over to the circuit court, apparently before it was learned that they were under the age of twenty-one years. In the second example given it was apparently learned that juveniles were involved in a hearing before the magistrate and they were immediately transferred to the juvenile court.

The age of the juveniles involved in the above examples is not given, and it is necessary to consider all the statutes which might apply.

Section 9705, R. S. Mo. 1939, is applicable to Dallas County and provides the method of procedure when a child under the age of seventeen years is charged with a criminal offense. That section is as follows:

"When in any such county a child under the age of seventeen years is arrested with or without warrant, such child shall, instead of being taken for trial before a justice of the peace, or police magistrate, or judge of any other court now or hereafter having jurisdiction of the offense charged, be taken direct before the circuit court; or if the child shall have been taken before a justice of the peace or a police magistrate or judge of such other court, it shall be the duty of said justice or police magistrate or judge to transfer the case to the circuit court, and of the officer having the child in charge to take such child before said court, and the said court shall proceed to hear the case. Nothing in this article contained shall be construed as depriving any court or magistrate of such counties of the powers now given them by the law to file complaints and issue warrants, but all subsequent proceedings shall be had in the circuit court. The circuit court shall proceed to hear and dispose of such cases in the same manner as if the proceedings had been instituted in said circuit court upon petition, as hereinbefore provided." (Emphasis ours.)

From the emphasized portion of the foregoing section, if it is brought to the attention of the magistrate that the child involved is under the age of seventeen years, said child shall immediately be transferred to the circuit court (no mention is made of the juvenile court).

Section 9700, R. S. Mo. 1939, fixes discretion in the circuit court as to whether children under the age of seventeen years will be tried in the juvenile court or under the general laws in a court of general criminal jurisdiction. That section is as follows:

"In the discretion of the judge of any court having jurisdiction of delinquent children under the provisions of articles 9 or 10, chapter 56, R. S. 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law, and any motion, petition or application, made to any court or judge having general jurisdiction of criminal causes, to transfer the case of or charge against any delinquent child to a court having jurisdiction of delinquent children under the provisions of said articles 9 and 10, may be denied in the discretion of the judge, when in the judgment of the judge such child is not a proper subject to be dealt with under the reformatory provisions of either said article 9 or said article 10."

Briefly stated, under the above statute, children of the age of sixteen years or less may be either tried under the general criminal statutes or in the juvenile court under a petition alleging the delinquency of the child involved.

A general discussion of the effect of Section 9700, supra, may be found in State ex rel. Wells v. Walker, 34 S. W. (2d) 124. In that case the relator, charged with the crime of burglary in the Circuit Court of Howard County, was fourteen years of age, and the court below found that he was not a proper person to be dealt with under the juvenile law, granting the State leave to prosecute him under the general criminal law. This finding below was upheld in the following portion of the opinion, l. c. 133:

"It is clear, therefore, that the respondent judge of the circuit court of Howard county has jurisdiction to proceed with this case in the manner contemplated by his order, or jurisdiction to conduct the case against relator as a delinquent child, and whether he may conduct it one way or the other is to be determined by him."

If the person charged with a crime was over the age of seventeen years at the time the alleged crime was charged to have been committed, none of the provisions relating to juvenile courts apply. This principle is announced in State v.

Damico, 4 S. W. (2d) 424, which was a decision by the Supreme Court of Missouri. We find the following in the opinion, l. c. 425:

" * * * According to the court's own finding, set out supra, this appellant was over the age of 17 years, when the alleged offense of manslaughter was committed. The juvenile court was wholly without jurisdiction to make any order in the case, or to enter any judgment therein. * * * "

CONCLUSION

It is, therefore, our conclusion that:

(1) There must be a transfer of the certificate of title to a motor vehicle in this state at the time of the sale and delivery of such vehicle, although some latitude may be allowed, according to the conditions surrounding the sale, for the actual transfer of said certificate of title.

(2) The owner of a motor vehicle may ordinarily testify to such ownership without the production of the certificate of title issued by the Secretary of State, although such title would be the best evidence if the ownership were in issue.

(3) When it appears that any child under the age of seventeen years is before a magistrate charged with the commission of a crime, it is the duty of such magistrate to immediately transfer the case to the circuit court having jurisdiction.

(4) A child under the age of seventeen years charged with the commission of a crime, in counties with a population of fifty thousand or less, may be proceeded against in the juvenile court by petition charging delinquency, or, in the discretion of the judge, where no request has been made for transfer to the juvenile court, may be tried under the general criminal laws.

(5) The juvenile court has no jurisdiction over the person of any minor over the age of seventeen years at the time of

Honorable James P. Hawkins - 8

the commission of the alleged offense for which he is to be tried.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

SCHOOL DISTRICTS:

Section 10484, Revised Statutes of Missouri, 1939, is applicable to consolidated school district as well as city, town or village school districts.

June 14, 1946

FILED

38

Honorable James P. Hawkins
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Mr. Hawkins:

We received your letter containing a request for an opinion based upon the following statement:

"Under the following facts could a mandamus proceeding be successfully brought?

"The necessary petitioners in a common school district have presented a petition to their three member board to call a special election for the purpose of being annexed to an adjoining Consolidated School District under section 10484 of the Revised Statutes of 1939. The board refuses to call the election contending that said section does not provide for annexation to a consolidated school district, but only to City or town districts. This consolidated school district is purely such as it does not have within it's boundaries a city, town or incorporated village."

Your question actually concerns the applicability of Section 10484, Revised Statutes of Missouri, 1939, to consolidated school districts. The question arises as to whether or not Section 10484 is applicable to consolidated school districts by reason of the naming in the statute of "any city, town or village school district." In construing the statute there are two theories. The first is the maxim of "expressio unius est exclusio alterius." However, this rule will never be applied to defeat the plainly indicated intention of the legislature. (See Missouri Digest, Vol. 26, Statutes, Key 195 for cases discussing this rule and its applicability.) The other theory in construing a statute is that all statutes which are in pari materia should be construed together in order to give effect, if possible.

(For cases discussing the applicability of the rule see Missouri Digest Vol. 26, Statutes, Key 225.) By reviewing the early volumes of the statutes it is clearly seen that from 1909 down to 1935 the articles and sections, contained in each revision of the statutes, contained the same subject matter and seek to accomplish the same purposes. Without question, the statutes of 1939, Article 5, Sections 10466 to 10517 should be construed together under the rule of pari materia. Article 5, Chapter 72, R. S. Mo. 1939, is entitled "Laws Applicable to City, Town and Consolidated Schools." It is obvious that the legislature intended all the sections in Article 5, Chapter 72 to be applied to consolidated school districts as well as city, town or village school districts. The mere failure of the legislature to specifically name consolidated school districts in Section 10484 does not render said section inapplicable to same. Furthermore, a specific announcement by the Supreme Court of Missouri that these laws are applicable to consolidated school districts is found in the case of Killam v. Consol. School Dist. of Lincoln County, 277 Mo. 458. At l.c. 468, the Supreme Court made the following statement:

"By the Act of 1913 (Laws 1913, p. 722) Article 4, Chapter 106, Revised Statutes, 1909, was made to apply to consolidated school district and county districts adjacent, where formerly it only applied to towns and villages and school districts adjacent."

Article 4, Chapter 106, R. S. Mo. 1909, is under the 1939 statutes as Article 5, Chapter 72, and contains the Sections from 10466 to 10517. A reading of the session acts of 1913, page 722, Section 1, shows that it was clearly the intent of the legislature for these laws to be made applicable to consolidated school districts. Said section provides as follows:

"The qualified voters of any community in Missouri may organize a consolidated school district for the purpose of maintaining both elementary schools and a high school as hereinafter provided. When such new district is formed it shall be known as consolidated district No. _____ of _____ county, and all the laws applicable to the organization and government of town and city school districts as provided in article IV, chapter 106 of the Revised Statutes of Missouri, 1909, shall be

applicable to districts organized under the provisions of this act." (Underscoring ours.)

Holding as we do that Section 10484 is applicable to consolidated school districts, under the decision of the Supreme Court, supra, and the legislative enactment, quoted supra, it next becomes pertinent to inquire as to how such procedure, as is provided for in Section 10484, may be procured. Section 10484 provides as follows:

"Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said purpose by giving notice as required by section 10418. * * *"

The use of the term "shall" in the above quotation indicates that the duties provided by the statutes are mandatory upon the school board, and their actions are not discretionary. In other words, the duty of the school board is ministerial in this instance. In the case of *State ex rel. Gault v. Gill*, 88 S. W. 628, 190 Mo. 79, the court pointed out that the calling of an election is mandatory, and a ministerial function. Specifically, the court said as follows:

"* * * Upon receiving the petition of the fifteen qualified voters and taxpayers of the district, the law imposed upon the board of directors the purely ministerial duty of ordering an election and giving notice thereof in the manner prescribed by the statute; in the performance of which duty they were invested with no discretion, and when they had performed that duty they became functus officio in the matter, which then passed into the hands of the qualified voters of the district, and it was for them and not for the directors, or any number of them to determine how it was to be disposed of."

In the case of *State ex rel. West v. Linn County*, 234 S. W. 54, 290 Mo. 134, the court pointed out that the County Superintendent of Schools had the duty to call a meeting for the consolidation of a school district upon the presentation of a proper petition. To restate this matter, the duties imposed by statute upon the school board, in this instance, are duties of a ministerial nature, and are not duties involving their discretion.

The school board has no other course to pursue but to execute the duties imposed upon them by the statute, upon being presented with a proper petition. Upon the presentation of a proper petition, as provided for in Section 10484, the Board of Directors shall order a meeting as is required by said section.

In answer to your specific question "under the following facts could a mandamus proceeding be successfully brought?", we wish to point out the ruling in the case of State ex rel. Rutledge v. St. Louis School Board, 33 S. W. 3, 131 Mo. 505, there the Court held: "If a school board is under a clear statutory duty to order an election, mandamus will lie to compel the performance of that duty", and further the case of State ex rel. Sturgeon v. Bishop, 189 S. W. 593, 195 Mo. App. 30, is applicable, the Court holding: "Mandamus is the proper remedy to compel the authorities to proceed with an election where the proceedings are regular and no matter of discretion remains to be disposed of."

CONCLUSION

It is, therefore, the conclusion of this department that Section 10484, Revised Statutes of Missouri, 1939, is applicable to consolidated school districts, and that it is the duty of the school board upon being presented with a proper petition, to call an election as provided for in Section 10484, to determine whether or not a common school district wishes to adjoin a consolidated school district, per the direction and authority of Section 10484, Revised Statutes of Missouri, 1939, that this duty to call an election is ministerial in nature, and the school board is divested of any discretion in the matter. Without complete knowledge of the facts in your case, we cannot say whether or not mandamus will lie, but mandamus is the proper remedy if the facts of your case come within the law cited supra.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MARRIAGE LICENSE: Requirement of marriage health certificate that certificate of physician be obtained by all persons applying for a marriage license and that laboratory report be rendered to a physician; held invalid under the present law.

September 21, 1946



Division of Health
Department of Public Health and Welfare
Jefferson City, Missouri

Attention: Dr. C. F. Adams

Gentlemen:

Reference is made to your communication of recent date requesting the official opinion of this department and enclosing a letter dated August 29, 1946, written to your department by W. H. Bartleson, Executive Secretary, Jackson County Medical Society, and reading as follows:

"A difference of opinion has arisen concerning the interpretation of sections 3364 a b c and d Missouri Statutes adopted by the legislature in 1943.

"It is our interpretation that the section provides that the recorder of deeds is privileged and permitted to issue a marriage license upon receipt of a negative serological report of syphilis from an approved laboratory. It is our further interpretation that in the event a positive report is furnished by an approved laboratory, then the recorder of deeds is permitted to issue a marriage license to the applicant upon receipt of a certification by the examining physician that in his opinion the applicant is not infected with syphilis in a communicable stage, and that he has made a physical examination of the applicant.

"It is our further opinion that the form #L45-500M-11-43 provided by the Division of Health to the recorder of deeds does not conform to the provisions of the statutes in respect to the instructions on the reverse side stating that each applicant must obtain a medical examination from a physician duly licensed, and furthermore that the information issued from the recorder's office that they require the signature of a physician on the lower half of the certificate before it can be accepted is in error.

"We believe that the certification by an approved laboratory of a negative examination is sufficient in accordance with the wording of the statutes for the recorder of deed to accept the report of the laboratory of a negative serological examination, and accordingly issue the marriage license.

"As provided in the statutes in the event that there is a positive finding by the approved laboratory, then it shall become necessary for the applicant to obtain a certificate from the physician in accordance with the provisions of the statutes.

"If you concur in the above observations, then we believe that the form now in use should be recalled and new forms prepared which would conform to the wording of the statutes, and also the interpretation of the law in providing the acceptance of the laboratory examination, with the exception and provided that a positive report from the laboratory shall require that the applicant obtain a physical examination from a licensed physician of the State.

"May we further suggest that this be submitted for an opinion of the Attorney General's Office."

In regard to the form L45-500M-11-43, an official opinion was rendered by this department on December 15, 1943, to Mr. John F. Sherrod, recorder of deeds, Jackson County, Missouri, in which questions raised in the letter of Mr. Bartleson are fully discussed. A copy of this opinion is enclosed.

It can be seen from a reading of the opinion rendered Mr. Sherrod that the Resolution adopted by the State Board of Health of Missouri at a meeting held at St. Louis, Missouri, on the 6th day of December, 1943, in so far as it requires that the laboratory shall make a report of its findings to a physician and that each applicant shall sign every laboratory report and physician's certificate, is arbitrary and capricious and there is no statutory authority or basis giving the State Board of Health the power to make such requirements. The requirement on the marriage health certificate form L45-500M-11-43 that each applicant shall have a physical examination by a physician in addition to the blood test, is also arbitrary and capricious action which is beyond the power of your department to require except in cases where the laboratory test is positive. The requirement that the laboratory report be rendered to a physician is also arbitrary and capricious.

The power given to your department in Section 3364a, Laws of Missouri, 1943, page 642, is confined to the drawing of rules and regulations concerning the procedure and methods of making such laboratory examinations and the filing of the reports of such examinations with the State Board of Health, and concerning the affidavits, certificates and other forms necessary for an efficient administration of Section 3364a through Section 3364c. Under this authority you have the power to make a requirement that all blood specimens of applicants for license to marry shall be drawn by a physician. This authority is due to the fact that the drawing of blood samples could not be properly done by one who was not qualified. However, any further rules made by your department in this regard will have to be authorized by the provisions of Section 3364a to Section 3364c, inclusive. We are enclosing forms which conform to the law as found in Section 3364a to Section 3364c, found on pages 641 and 642, Laws of Missouri, 1943.

Conclusion

It is the opinion of this department that the requirement of form L45-500M-11-43 that all applicants for a license

Division of Health
Dr. C. F. Adams

-4-

to marry shall have a certificate signed by a licensed physician and the requirement of said form that the laboratory report be rendered to a physician, is invalid and not based on any law, and such requirement is arbitrary and capricious and cannot be upheld.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

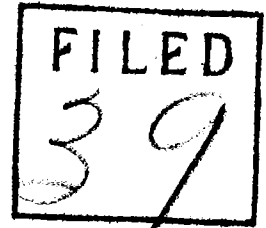
J. E. TAYLOR
Attorney General

CEB Jr.:EG

UNEMPLOYMENT COMPENSATION:

1) Unemployment Compensation funds are not necessarily state funds; 2) neither are they such taxes as to require them to be paid into the State Treasury or appropriated out by law.

July 2, 1946



Honorable Carl J. Henry,
Chairman
Unemployment Compensation Commission
Jefferson City, Missouri

Dear Mr. Henry:

In answer to the questions proposed to this office for solution by your recent letter we believe it necessary to quote and review those portions of the Federal Act and those portions of the Constitutions of 1875 and 1945, that we deem pertinent. Section 903, Title IX, Federal Social Security Act, reads, in part, as follows:

"All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904."

From this portion of the Federal Social Security Act, the conflict, if any exists, arises by the requirement of said section that the moneys received (by the State) be immediately paid over to the Secretary of the Treasury of the United States. With that requirement of the Federal Social Security Act in mind, we must examine the constitutional provisions to see whether or not there are any prohibitions against such immediate payment, or whether or not there are any specific directions as to the mode of payment. In the Missouri Constitution for 1875, Section 43, Article 4, of the Constitution of Missouri, read, in part, as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Section 15, Article 10, Missouri Constitution of 1875, reads, in part, as follows:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General, select."

A third section of the Missouri Constitution for 1875, Section 19, Article 10, reads, in part, as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor."

Under these sections it appears that there is a possible conflict between the Federal Social Security Act, Section 903, quoted supra, and the constitutional prohibition against any moneys of this State being paid out other than by appropriation of law.

On January 7, 1937, this office rendered an opinion to Senator Allen McReynolds, which interpreted and applied the constitutional provisions of the Missouri Constitution for 1875, quoted supra, and concluded that the moneys paid by the employers under a state unemployment insurance law are not necessarily "state funds" within the meaning of the constitutional provisions of 1875. In other words, the prior opinion held that these were moneys which could be collected and put into a separate and distinct fund, and paid directly over to the United States Treasury without being required to be appropriated out by law. Turning now to the Missouri Constitution for 1945, we find that Section 43, Article IV, of the Constitution for 1875 is now Section 36, Article III, of the Constitution of 1945, which reads, in part, as follows:

"Limitation of Withdrawals to Appropriations--
Order of Appropriations.--All revenue collected and moneys received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pur-

suance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order: * * **"

It will be seen upon a comparison of the two sections, that is, Section 43, Article IV, Constitution of 1875, and Section 39, Article III, for 1945, that there has been and is no substantial change in either the language or the purpose of the two sections. From the Constitution of 1875 we quoted above, Section 15, Article X. From the Constitution of 1945, we find that Section 15, Article IV, contains and seeks to combine Section 43, Article IV, and Section 15, Article X, both from the Constitution of 1875 into the present Section, Section 15, Article IV, which reads as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

The third quotation from the Constitution of 1875, supra, was Section 19, Article X. This section is now found under Article IV, Section 28. This is a new section and supersedes the first part of Section 19, Article X of the Constitution of 1875. With the said Social Security Act requirement and these provisions of the Constitution of 1945 in mind, our question comes down to this: Are funds collected by the state from employers to be paid employees during a period of unemployment "state funds" within the meaning of the constitutional pro-

visions, so that said "state funds" must go into the Treasury of the State and then be appropriated out by law, or may said funds be directed into a special fund and paid directly over to the Treasury of the United States without an appropriation by law. In order to answer this it is necessary to first determine what is meant by the terms "all money", "revenue", and "state funds". The writer believes that these three terms are used interchangeably and for the same purposes, and we will assume for the purpose of this opinion that they are interchangeable. Therefore, a definition of the term "revenue" is applicable and definitive of all three.

In the case of *State v. Board of Regents*, 264 S. W. 698, 1.c. 699, the Supreme Court of Missouri, en banc, in discussing Section 43, Article IV, of the Constitution of 1875 defined the term "revenue". Therein the court had the following to say:

"* * * By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. * * *" (Underscoring ours)

In examining the above quotation the writer wishes to point out three things. First, that in order for revenue (state funds or moneys) to be classified as belonging to the state in such a manner that they must be appropriated out by law, said revenue must be subject to appropriation for public uses; secondly, that said revenue must be required to be paid into the State Treasury before it becomes revenue or state money within the constitutional provisions; thirdly, and this is the criterion upon which we will ultimately make our decision, its classification, that is, the classification as revenue, as being within the constitutional provision, is dependent upon specific legislative enactment. Those three things are clearly established by the quotation from the Board of Regents case, supra. To restate this matter the rule seems to be that state funds, i. e., revenue and money received by the State, must go into the treasury. It is the intention of the Legislature that must be looked to in determining whether

any fund is a state fund. One of the surest indications, on the part of the Legislature, that a fund is to be a state fund, is that it is required to be paid into the treasury. Even then, if the fund is not subject to appropriation for public use, it is not state funds. The Legislature must give the State authority to receive such funds as state funds, and if the intention of the Legislature is that they are not to be state funds, and there are no other constitutional inhibitions, then the funds do not have to go into the treasury, nor be appropriated out by law.

There are many instances wherein revenues (state funds or moneys) have been subjected to a ruling by the courts as to whether or not said funds came within the constitutional provisions. That there is revenue (state funds or moneys) that comes into being by operation of law, but does not necessarily belong to the State, in such a sense as to require its payment into the Treasury, and its withdrawal by appropriation, we cite the following cases: State ex rel. Stevenson v. Stephens, 37 S. W. 506; Ex parte Lucas, 61 S. W. 28; State ex rel. Kerster v. Hackman, 264 S. W. 366; State ex rel. Curators v. Walker, 144 S. W. 866; State ex rel. Clerk v. Gordon, 170 S. W. 892; and State ex rel. McKinley Publishing Co. v. Hackman, 282 S. W. 1007.

There are many Missouri Statutes relating to revenues (state funds or moneys) in the possession of the State which are not in the Treasury, or, if said revenues are in the Treasury, said revenues do not have to be appropriated by law in order to be paid out, the intention of the Legislature being that they are not revenues (state funds or moneys) within the meaning of the constitutional provision.

Section 620, R. S. Mo. 1939, relates to the Escheat Law and provides that the State Treasurer shall hold certain moneys in escheat, which will be paid out of the Treasury upon request of those who are entitled to the money. A clear indication of the legislators intent that said moneys was not to be subjected to the constitutional provisions limiting the method of payment.

Section 7897, R. S. Mo. 1939, provides that the Commissioner of Finance shall hold all unclaimed deposits, dividends, and interest of any creditor, depositor, stock holder, or share holder of any corporation. Under this section it is evident that it was the intention of the legislature to authorize the Commissioner to hold the moneys (state funds or moneys) himself, and pay the same out without appropriation by law.

Section 5678, R. S. Mo. 1939, relates to deposits unclaimed, insolvent, or closed savings banks. These deposits are to be held by the State Treasurer for the use and benefit of the depositors and paid out on the claim of said depositors.

Provisions for the deposit of all securities by the insurance companies with the Department of Insurance of the State of Missouri, which deposits are held by said department, and returned without ever having been paid into the State Treasury or appropriated by law, are found in Sections 5815, 5817, 5822, 5872, 5876, ~~5876~~, 5860, 5861, 6206, 6047, 5913, 5919, R. S. Mo. 1939.

The sections of the statutes referred to supra are concrete examples of the legislators intent to provide for revenues (state funds or moneys) and to exempt them from the constitutional provision by bringing them under the definition of "revenue" as laid down in the Board of Regents case, cited supra.

With the definition of revenue in mind, as laid down in the Board of Regents case, supra, and the fact, as evidenced by the statutes cited supra, that there are statutory provisions for revenue which does not come within the constitutional provision, we will examine the question as to whether or not the revenue received by the Missouri Unemployment Compensation Commission is such revenue as comes within the constitutional provisions, or, is such revenue as falls within the definition of revenue under the Board of Regents case, supra, and thereby are exempted from the constitutional provisions. The Missouri Unemployment Compensation Commission Act first appeared in the Laws of 1939, page 574, Section 1. Subsequently, this act was contained in the Laws of 1939, under Article II, Chapter 52, and contained Sections from 9421 through 9445.

Section 9433, R. S. Mo. 1939, provided for a separate and special fund apart from all public moneys or funds of this state for the Unemployment Compensation Commission and directed what said fund should consist of. In Laws of 1941, page 621, Section 11, Section 9433 (a) provides, in part, as follows:

"Section 9433. (a) There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this law. * * *"

* * * * *

"All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to section 9436 or payments made necessary under the provisions of Sections 9426 (m), 9426A and 9441 may be paid from the clearing account or the benefit account upon warrants issued

by the treasurer under the direction of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of state moneys in the possession or custody of the State Treasurer to the contrary notwithstanding, * * *"(Underscoring ours)

It is apparent from the most cursory perusal of the above quoted portion of the statute that the fund established thereunder for the Missouri Unemployment Commission is a distinct fund, and is to be administered separate and apart from any provision of the law in this state relating to the deposit, administration, release, or disbursement of state moneys.

It is impossible for the writer to believe that the legislature could more clearly have indicated their intention that this revenue was not to be classified as state funds, and thereby required to be paid into the State Treasury and then appropriated out by law. The legislature states in its enactment, in precise and clear terms, that this is a special fund, separate and apart from all public moneys or funds of this state. Surely, nothing more is necessary to indicate their intention.

It is our conclusion that these moneys are not such funds as will come within the constitutional provisions quoted supra. In other words, the moneys received by the Missouri Unemployment Compensation are not such moneys (state funds or moneys) as are required to be paid into the State Treasury and appropriated out by law. The next question that arises is whether or not Section 22 of Article IV of the Constitution of 1945 is applicable to the revenue which has been received, handled, and disbursed by the Missouri Unemployment Compensation Commission under the statutes enacted therefor. Section 22, Article IV, establishes the Department of Revenue, and under said department, the Division of Collection. Said section provides, in its pertinent parts, as follows:

"* * * The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. * * *"(Underscoring ours)

Upon a reading of this section it is apparent that the Division of Collection shall collect all "taxes * * * payable to the state". There is no question but that the revenue raised by the Unemployment Compensation Act and paid into the Unemployment Compensation fund comes into being by virtue of a "taxing statute".

In the case of *A. J. Meyer & Co. v. U. C. C.* 152 S. W. (2d) 184, 1.c. 191, the court said:

"(7, 8) As we see it, there is no escape from the conclusion that the unemployment compensation act includes a taxing statute, and 'it is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are to be construed strictly against such taxing authority.'"

Another authority to the same effect is *Atkisson v. Murphy*, 179 S. W. (2d) 27, 1.c. 30.

From the above quoted cases it appears that the revenues (state funds or moneys) raised by the Unemployment Compensation Act are in the nature of taxes. Upon rereading Section 22 of Article IV, quoted supra, we see that the constitution specifically states that the Division of Collection, under the Department of Revenue, shall collect all "taxes * * * payable to the state". In our opinion the use of the words "payable to the state" refers to the taxes collected at the direction of the state, and required to be paid into the Treasury and appropriated out by law. Also, the use of the words "payable to the state" is such a limitation as to apply to only those taxes which fall within that requirement. In other words, if the taxes are of such a nature that they are not, first, required to be paid into the State Treasury, second, subject to being appropriated for public uses, and thirdly, the state being required to receive said funds by specific legislative enactment, they are not such taxes as come within the limitation "payable to the state" as found in Section 22 of Article IV, Constitution of 1945.

As shown supra, in the discussion of this revenue (state funds or moneys) it was the clear and unassailable intent of the legislature that the revenue raised by reason of the Unemployment Compensation Act was not such revenue as was belonging to or was payable to the state. As stated supra, this revenue constitutes a special fund, separate and apart from all public moneys or funds of this state.

The revenue in this instance, even though classified as a tax, is not required by the very statute which brought it into being, to be paid into the State Treasury. Furthermore, there is no authority for the State of Missouri to receive said revenue. Neither is said fund subject to appropriation by the State for public uses, and it is apparent that the legislature never intended said revenue to be considered as belonging to or being a part of any state revenue (state funds or moneys).

CONCLUSION

It is the opinion of this department that, first, under the Constitution of 1875 and under the Constitution of 1945, any revenue raised and collected by reason of the Unemployment Compensation Act is not such revenue as is required to be placed into the State Treasury and appropriated out and, therefore, there is no conflict between the requirement of Section 903, Title IX, of the said Social Security Act and any provision of the Constitution of 1945, relative to revenue, its collection, deposit, or disbursement. Secondly, Section 22 of Article IV, Constitution of 1945, empowering the Division of Collection to "collect all taxes * * * payable to the state" does not apply to the collection of the revenue raised by the taxing authority of the Unemployment Compensation Act for the reason that said revenue is not payable to the state. In other words, the second conclusion above, when applied to the specific question, means that the Unemployment Compensation Commission will continue to collect, as its own agency, the funds raised by said Act and that said revenue is not required to be deposited with the State Treasury or appropriated out by law.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:dc

AND TAXES:

In re: Commissioners of the
assessment road district organized
under Article XI, Chapter 46, R. S.
Mo. 1939, unauthorized to make a tax
levy under Section 8716, R. S. Mo.
1939, either with or without an election
by the people.

April 22, 1946

4/29
FILED

40

Honorable Wilson D. Hill
Prosecuting Attorney, Ray County
Richmond, Missouri

Dear Mr. Hill:

This will acknowledge receipt of your request for an official opinion which reads:

"May I have an opinion based on the following facts:

"The Georgeville Special Road District, a Special benefit assessment Road District, organized under Section 8710, Revised Statutes, 1939, desires to make a maximum tax levy allowed by law for the year 1946 to purchase machinery.

"In view of the new Constitution, Article 10, Sections 11F and 12A and the fact that Section 8716, Revised Statutes, 1939, has been held unconstitutional, is it possible for the Commissioners themselves to set the tax levy without first having an election called and held in the manner required by law?"

You inquire if its possible for the Board of Commissioners of a special benefit assessment road district, organized as hereinabove stated in your letter, to make a tax levy as provided in Section 8716, R. S. Mo. 1939, without first holding an election. Section 8716, R. S. Mo. 1939, reads:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property

taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued."

The above provision has been held unconstitutional in part only. The Supreme Court held the part that authorizes the road commissioners to make an unlimited levy for general road purposes violates Section 23, Article X, Constitution of Missouri 1875, as adopted in 1920. Said section limits the levy that may be made by the county court for the same purpose as provided in Section 8716, supra, to fifty (.50¢) cents on the one-hundred (\$100.00) dollar valuation of property, even when authorized by a vote of the people and said provision reads:

"In addition to the taxes now authorized to be levied for county purposes, under and by virtue of Section 11 of article 10 of the Constitution of this State, and in addition to the special levy for road and bridge purposes authorized by section 22 of article X of the Constit-

ution of this state, it shall be the duty of the county court of any county in this State, when authorized so to do by a majority of the qualified voters of any road district, general or special voting thereon at an election held for such purpose to make a levy of not to exceed fifty cents on the one hundred dollars valuation on all property within such district, to be collected in the same manner as state and county taxes are collected, and placed to the credit of the road district authorizing such special levy. It shall be the duty of the county court, on petition of not less than ten qualified voters and taxpayers residing within any such road district, to submit the question of authorizing such special election to be held for that purpose, within twenty days after filing of such petition."

In holding that part of Section 8716, supra, which attempts to authorize the Board of Commissioners of said road districts to make an unlimited levy, unconstitutional, the Supreme Court in *State vs. Southwestern Bell Telephone Co.*, 179 S. W. (2d) 77, 1.c. 79, 80 and 81, said:

"* * * Thus it appears that by Secs. 11, 22 and 23, Art. X, Constitution, and by Sec. 8715, R. S. 1939, Mo. R.S.A., the taxable property in special road districts is safeguarded as to what tax may be levied by the county court or voted by the people, but if Sec. 8716 is not affected by the amendment of 1920, then the commissioners of a special road district may levy any tax, regardless of the amount, if it is short of confiscation.

* * * * *

"* * * Prior to the adoption in 1920 of Sec. 23, Art. X, there was no specific Constitution authorized levy in special road districts for general purposes in the district, and the concrete question is, Did Sec. 23, Art. X, by implication, render Sec. 8716 no longer valid

as to levies for general district purposes?

* * * * *

"* * * We do not think it can be said with good reason that, after the adoption of Sec. 23, Art. X, limiting levies by the county court for general purposes to 50 cents on the \$100.00 valuation, even when authorized by vote of the people, that it was intended to leave in effect Sec. 8716, which authorizes the board of commissioners to make unlimited levies for the same purpose. 'The wisdom of these (constitutional) safeguards (against excessive taxation) has been fully demonstrated by the experience.' Kansas City F. S. & M. R. Co. v. Thornton, 152 Mo. 570, loc. cit. 575, 54 S. W. 445, loc. cit. 447.

"(6) It is true that Sec. 8716 was enacted in 1913, and therefore prior to the adoption of Sec. 23, Art. X, Constitution, but 'it is the duty of the courts, to enforce the organic law and to brush aside any statute which conflicts with it, whether it was passed before or after the constitution was adopted.' Kansas City, F. S. & M. R. Co. v. Thornton, 152 Mo. 570, loc. cit. 575, 54 S. W. 445.

"(7) We are constrained to rule that the portion of Sec. 8716, R. S. 1939, Mo. R. S. A., authorizing the commissioners to make an unlimited levy as therein provided for general purposes in the district as therein specified, is in conflict with Sec. 23, Art. X, of the Constitution, and is void."

It is well established that when a statute is adjudged unconstitutional it is as if it had never been. This is also true of any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never or at anytime been possessed of any legal force.

In State ex rel. v. Eby, 170 Mo. 497, 1.c. 525, the Court said:

"4. There is yet another ground upon which I regard relators entitled to the relief they seek, and that is I still deem the "Beer Inspection Law," as it is commonly called, unconstitutional. Judge Cooley says: 'When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.' (Cooley's Const. Lim. (6 Ed.), 222.)"

In view of the foregoing rule since the Court has heretofore declared that part of Section 8716, supra, which authorizes the Board of Commissioners of said road district to make an unlimited levy, unconstitutional, that part of said section is forever unconstitutional and cannot hereafter be considered as authority for said Board of Commissioners making a levy. Therefore, unless there is some provision in the Constitution of 1945 which grants said Board of Commissioners authority to make a levy and said provision is also self-enforcing, or the Legislature subsequently thereto enacts legislation conforming to said Constitutional amendment authorizing said Board of Commissioners to make a levy, the Board of Commissioners of said road district cannot make a levy under any circumstances.

You specifically mention Section 12(a) Article X, Constitution of Missouri 1945, as possibly granting such authority to the Board of Commissioners to make a levy. Said section practically follows Section 23, Article X, supra, with this exception, that it limits the maximum levy to thirty-five (.35¢) cents on the one-hundred (\$100.00) dollar assessed valuation of property. Furthermore, it includes a similar provision as contained in Section 22, Article X, Constitution of 1875. Therefore, no such authority to make a levy is vested in said Board of Comm-

Hon. Wilson D. Hill

Commissioners by reason of Section 12(a), Article X, Constitution of Missouri, 1945.

Section 12(a) supra, reads:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

The foregoing constitutional provision follows Section 23, Article X, Constitution 1875, which was the direct cause of the Court declaring a part of Section 8716, supra, unconstitutional.

You also refer to Section 11(b), Article X of the Constitution of 1945, which provides that nothing in the Constitution of 1945 shall prevent the enactment of any general law permitting a county or political subdivision to levy taxes, other than ad valorem taxes, for its essential purposes and reads:

"Any tax imposed upon such property by municipalities, counties or school districts for their respective purposes, shall not

exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;

"For counties--thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

Furthermore, Section 15, Article X of the Constitution of 1945, defines the words "other political subdivisions" as used in said Article X, to include, among others, road districts, and said amendment reads:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Neither Section 12(a) or Section 11(b), supra, are self-enforcing for the reason they require an enactment by the General Assembly. In view of Section 11(b), supra, and Section 15 of the Constitution of 1945, we are of the opinion that the Board of Commissioners of said road district may levy taxes for essential purposes, if such taxes are not classified as ad valorem taxes and if an act is passed by the General Assembly subsequent to the adoption of the new Constitution of 1945, authorizing such Board to levy such tax. That Section 11(b), supra, clearly contemplates such an enactment to be prospective in nature and not retrospective is evidenced by the very words used which are "nothing in this Constitution shall prevent the enactment of any general law * * *".

It is a well established rule of statutory construction, which is also applicable in construing constitutional amendments, that an act shall be construed as being prospective in nature, unless the intent is clearly expressed in said act that it shall act retrospectively or that the language of the statute admits of no other construction. In *Lucas v. Murphy*, 156 S. W. (2d) 686, 1.c. 689 and 690, the court, in approving the foregoing rule of statutory construction, said:

(5,6) The statute says that taxes due the state from corporations 'are hereby declared to constitute a prior lien and a preferred claim against the assets of such corporation' but such language, in and of itself, does not compel retroactive or retrospective construction. "Retroactive" or "retrospective" laws are generally defined, from a legal viewpoint, as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.' 2 Cooley, Taxation, Sec. 513, p. 1144; 2 Lewis-Sutherland, Statutory Construction Sec. 641, p. 1157. Regardless of the type of legislation under consideration, 'In the construction of statutes the uniform rule is that they must be held to operate prospectively only, unless the intent is clearly expressed that they shall act retrospectively, or the language of the statute admits of no other construction.' *Jamison v. Zausch*, 227 Mo. 406, 417, 126 S. W. 1023, 1027, 21 Ann. Cas. 1132; 2 Cooley, Taxation, Sec. 514, p. 1145; 2 Lewis Sutherland, Statutory Construction, Sec. 642, p. 1157; Const. Mo. Art. 2, Sec. 15."

(See also *Cleveland v. Laclede-Christy Clay Products*, 113 S. W. (2d) 1065, 1.c. 1072).

Ad valorem has been generally defined to mean "according to valuation" and is invariably based upon ownership of property and is oftentimes in the form of a percentage of the value of the property. In *Powell v. Gleason*, 114 A.L.R. 838, l.c. 843, the Supreme Court defined ad valorem as follows:

"* * *The three principal forms now in use are ad valorem property, excise, and income taxes. The phrase 'ad valorem' means, literally, 'according to the value,' and is used in taxation to designate an assessment of taxes against property at a certain rate upon its value. Webster's New International Dictionary. An ad valorem property tax is invariably based upon ownership of property, and is payable regardless of whether it be used or not, although of course the value may vary in accordance with such factor. It is neither intended nor expected that it be passed on, though under some circumstances, as with rental property, this may be done. It, for many years, has been the chief, and frequently the only, method of securing revenue for the states and their local subdivisions.* * *"

In *Pacific Fruit Express Co. vs. Oklahoma Tax Commission*, 27 Fed. Supp. 279, l.c. 283, defined ad valorem as follows:

"* * *In other words, there shall be no discrimination in the taxation of this class of property from other classes of property that is taxed upon an ad valorem basis. It is conclusive that the intent of the Legislature was to make this tax a property tax, and based upon the valuation of the property at the same rate as other property, and the same must be considered a property tax. It is simply a method to arrive at a property tax, and in its final analysis it is nothing more nor less than a property tax." (Italics supplied.)

CONCLUSION

Therefore, in view of the foregoing authorities, it is the

opinion of this department that said Board of Commissioners of such a road district cannot, under the Constitution of Missouri, 1945, more specifically Section 11(b), and Section 12(a) of Article X of said Constitution, 1945, make a levy on the valuation of the property in said road district for general road purposes as provided in Section 8716, R. S. Mo. 1939, either with or without the vote of the people. That part of Section 8716, supra, authorizing the Board of Commissioners to make an unlimited levy was declared unconstitutional and is unconstitutional forever thereafter. That the Board of Commissioners of said road district may levy taxes for essential purposes, if said taxes are not classified as ad valorem taxes and if the General Assembly shall enact a statute granting said Board of Commissioners such authority.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

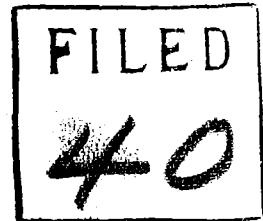
ARM:mw

ELECTIONS: Names of persons written in on a primary ballot should not be placed upon the official ballot for the general election.

September 13, 1946

FILED 40

Honorable David W. Hill
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, which reads as follows:

"At the coming general election, must the county clerk place on the printed ballots names of persons whose names were written in the primary ballots when such persons had not filed any declaration of candidacy, and did not have their names printed on the primary ballot?

"The county clerk desires an early opinion."

The county clerk, in having the ballots printed for the general election, must follow Section 11595, R. S. Mo. 1939, which provides, in part, as follows:

"Every ballot printed under the provisions of this article shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. * * * *"

From the above quotation it will be noted that before a county clerk may put a name on a ballot a person must have been nominated and said nomination certified in accordance with Chapter 76, Revised Statutes of Missouri 1939.

Except in the event of a vacancy created by death or resignation, there are only two ways in which a candidate may be placed in nomination. First, by virtue of Section 11525, R. S. Mo. 1939, which provides:

"Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

Secondly, by virtue of Section 11534, R. S. Mo. 1939, which provides:

"The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made: Provided, that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

The persons referred to in your request should not have been certified because they were not nominated in accordance

Hon. David W. Hill

(3)

with the election laws of this State. Senate Bill No. 10, of the 63rd General Assembly, which provides for the manner of voting in a primary, provides, in part, as follows:

"* * * At primary elections at which committeemen or committeewomen of any party are to be elected, in addition to the names of candidates for said offices printed on said ballot, there shall be printed thereon at least one blank line with a square to the left of the same, as hereinbefore specified, for the purpose of allowing the voter to write in the name of his choice for said office. As nearly as practicable, the ballot shall be in the form described in Section 11595 of the Revised Statutes of Missouri, 1939. At the head of each such ticket, immediately following the date of such election, shall be printed the following: 'Instruction to voters: Place an X in the square opposite the name of the person for whom you wish to vote'. The voter shall cast his vote in accordance with this instruction and shall vote in no other manner. * * * * *

It is clear from the above portion of Senate Bill No. 10 that in the primary a "write-in" vote is only valid when cast for a committeeman or committeewoman.

Conclusion

Therefore, it is the opinion of this department that the county clerk should not place the names of persons on the ballot for the general election whose names were "written in" on the primary ballots, when such persons had not filed any declaration of candidacy.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CONSTITUTIONAL LAW:
MAGISTRATES:

In re: Under Section 24, Article V, Constitution of 1945, and Section 2811.103, Missouri R. S. A., preparing state and federal income tax returns is doing law business.

October 18, 1946



Honorable Roger Hibbard
Prosecuting Attorney
Hannibal, Missouri

Dear Mr. Hibbard:

This will acknowledge receipt of your letter of recent date asking if Section 2811.103, Missouri Revised Statutes, Annotated, Senate Bill No. 207, Section 3, prohibits magistrates from preparing federal and state income tax returns for individuals. Your letter, in part, reads:

"A question of the interpretation of Section 2811.103, R. S. Mo. 1939, Laws of Missouri, 1945, Senate Bill 207, Section 3, pertaining to the new office of magistrate has been presented to me, and I herewith request an opinion concerning the following:

"The last portion of the above designated section provides 'No magistrates shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate.' Does this section prohibit a magistrate from preparing Federal and State Income Tax Returns for individuals for compensation?"

* * * * *

Section 18, Article V, Constitution of 1945, provides for the establishment of magistrate courts in each county and reads, in part, as follows:

"There shall be a magistrate court in each county.* * *In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate.* * *"

Section 24, Article V, Constitution of 1945, limits the compensation of magistrates to their salaries and, in part, provides:

"* * *The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business,* * *"

Pursuant to the constitutional provisions relating to magistrates and magistrate courts, the 63rd General Assembly enacted Senate Bill No. 207, which was approved March 11, 1946, and is now incorporated in the Missouri R. S. A., chapter 11A, Article I.

Section 2811.103 supra, in part, provides:

"* * *No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

Getting to the question at hand, we do not believe that a magistrate would be receiving additional compensation for the performance of a public service, as contemplated in Section 24, Article V of the Constitution and Section 2811.103, supra, if he prepared federal and state income tax returns for private individuals and received compensation for making out the returns. Therefore, we must consider whether or not the preparation of federal and state returns would constitute the practice of law, or the doing of law business, as contemplated by the constitutional and statutory provisions.

Section 13314, R. S. Mo. 1939, provides that any person, association or corporation engaging in the practice of law or doing law business without being duly licensed shall be guilty of a misdemeanor. Section 13313, R. S. Mo. 1939, defines the "practice of law" and "law business" as follows:

"The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of

any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

A leading Missouri case on unauthorized practice of law is *Liberty Mutual Insurance Co. v. Jones*, 130 S. W. (2d) 945, 344 Mo. 932, 125 A. L. R. 1149, which involved the determination of whether or not the adjusting of claims by representatives of insurance companies constituted the practice of law or doing law business. At S. W. (2d) 1. c. 341 the court said, quoting from *Clark v. Austin*, 340 Mo. 467, 101 S. W. (2d) 977:

Extra Copy /
"It would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so. It will be sufficient for present purposes to say that one is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations, or corporations as to their rights under the law,

"Or, appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law.

"Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law."

Again at S. W.(2d) 1. c. 955, Ellison, J. said:

"* * *Broadly speaking, the Clark-Austin definition includes under the term 'practice of law' nearly everything that the statutory definition classes under two heads, 'the practice of the law' and 'law business'. The first paragraph of the former specifies engaging in the business of giving advice as to legal rights for a valuable consideration. The second paragraph includes appearances in court, etc., in a representative capacity, and related activities, but mentions no consideration. The third paragraph covers both classes of acts in behalf of clients but without requiring a consideration."

Also the following appears at S. W.(2d) 1. c. 955:

"It must be admitted that many definitions of the 'practice of law' include acts done both in and out of court, including services where no litigation is in prospect. Nevertheless there are fundamental differences between the practice of law--in the sense of court work--and law business. While a layman may represent himself in court, he cannot even on a single occasion represent another, whether for a consideration or not. And a corporation cannot represent itself in court at any time but must appear by attorney. On the other hand the doing of any single act out of court in a representative capacity that a lawyer might do will not necessarily convict a layman of engaging in the law business. The very term itself implies that he must have engaged in the business or held himself out, as some cases say. Illustrative decisions are cited in the margin. The holding out may be evidenced by repeated acts indicating a course of conduct, or by the exaction of a consideration."

In the case of In re Matthews, 57 Ida. 75, 79 Pac.(2d) 535,

the following is said at Pac.(2d) 1. c. 538, regarding what services shall constitute the practices of law:

"Where the rendering of such services involves the use of legal knowledge or skill, or where legal advice is required and is availed of or rendered in connection with such transaction, this is sufficient to characterize the services as practicing law. People v. Schreiber, 250 Ill. 345, 95 N. E. 189; People v. Alfani, supra; People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E.666; In re Eastern Idaho Loan & Trust Co. 49 Idaho 280, 288 P. 157 (73 A. L. R. 1323).

"Where a will, contract, or other instrument is to be shaped from facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required, and a charge for such service brings it definitely within the term "practice of the law." In re Eastern Idaho Loan & Trust Co., supra.' (Italics inserted.)

"In Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, 837, the rule is stated as follows: 'But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. The mere act of a scrivener who writes something dictated by another would not be practicing law.'(Italics inserted.)"

In the case of Bump et al. v. District Court of Polk County, 232 Ia. 623, 5 N. W.(2d) 914, the following appears: (1. c. 918.)

"(7,8) There is no question that the preparation of pleadings, management of litigation for clients, advice to clients of their legal rights and all actions taken by them connected with the law, by one not a member of a bar constitutes the illegal practice of law. In Barr v. Cardell, 173 Iowa 18, 155 N. W. 312, 316, the defendant's right to the office of municipal

judge was assailed, one of the grounds being that he was not a practicing attorney at law at the time of his election, as required by statute. But the Supreme Court held otherwise, and defined the practice in a quotation from *In re Duncan*, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. N.S., 750, 18 Ann. Cas. 657: 'It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general all advice to clients and all actions taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.' Citing also *Eley v. Miller*, 7 Ind. App. 529, 34 N.E. 836. The opinion in the Barr case then says: 'One may be a practicing attorney in following any line of employment in the profession. If what he does exacts knowledge of the law and is of a kind usual for attorneys engaging in the active practice of their profession, and he follows some one or more lines of employment such as this, he is a "practicing attorney at law," within the meaning of the statute.* * * *'

After reading the cases herein cited and many others, we believe that it is practically impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law, or the doing of law business, and that it is necessary to decide each case largely upon its own particular facts.

The Appellate Courts of Missouri have never ruled upon the question of whether or not the preparation of income tax returns constitutes the practice of law by laymen. However, a few other jurisdictions have ruled on this question.

In *Merrick et al., v. American Security & Trust Co.*, (C.C.A. 1939) 107 Fed.(2d) 271, there was involved a suit to enjoin a

trust company from practicing law. Among its various activities was the preparation of tax returns by its lay employees. Regarding this practice, the court said at Fed. (2d) 1. c. 278:

"Appellants do not emphasize the fact that defendant employs laymen to prepare tax returns and address arguments to tax officials. Such work may properly be done by lawyers or laymen.* * *"

Again in the case of Groninger et al. v. Fletcher Trust Co. (1942) 220 Ind. 202, 41 N. E. (2d) 140, the court said at N. E. (2d) 1. c. 142:

"The appellee furnishes to its customers pamphlets descriptive of tax laws state and national, with illustrations indicating tax liability under given circumstances, and the proper method of making tax returns. It sometimes acts through its employees who are not lawyers, in arriving at proper computations and agreements with ministerial taxing officers. It cannot be seriously contended that these activities constitute an unlawful practice of law."

The most recent case ruling upon the question of preparation of tax returns as constituting the practice of law is Lowell Bar Association v. Loeb (1943) 315 Mass. 176, 52 N. E.(2d) 27. In this case the defendants were conducting a business styled "The American Tax Service" which made out tax returns, both state and federal, for persons whose income consisted entirely, or almost so, of wages or salaries. They did not attempt to make out income tax returns for corporations, partnerships, estates or other businesses. In ruling on the question of whether or not the laymen, who made out such returns, were engaged in the practice of law, the court said, beginning at N. E.(2d) 1. c. 34:

"Moreover, we do not decide at this time whether considering, or advising upon, questions of law only so far as they are incidental to the preparation for another of an income tax return may constitute the practice of law where the return is more complicated than were those in the case before us, and the questions of law as well as of accounting are correspondingly more difficult and important.

"Confining our decision to the case at bar, we find the respondents engaged in the business of making out income tax returns of the least difficult kind. The blank forms furnished by the tax officials for that class of returns are made simple, and are accompanied by plain printed instructions. The forms may appear formidabile to persons unused to mental concentration and to clerical exactness, but they can readily be filled out by any intelligent taxpayer whose income is derived wholly or almost wholly from salary or wages and who has the patience to study the instructions.

"We are aware that there has been said to be no difference in principle between the drafting of simple instruments and the drafting of complex ones. *People v. Lawyers Title Corp.*, 282 N.Y. 513, 521, 27 N.E.(2d) 30; *Paul v. Stanley*, 168 Wash. 371, 377, 378, 12 P.2d 401. But though the difference is one of degree it may nevertheless be real. *Irwin v. Gavit*, 268 U.S. 161, 168, 45 S.Ct. 475, 69 L.Ed. 897; *Rideout v. Knox*, 148 Mass. 368, 372, 19 N.E. 390, 2 L.R.A. 81, 12 Am.St.Rep. 560; *Smith v. American Linen Co.*, 172 Mass. 227, 229, 51 N.E. 1085. There are instruments that no one but a well trained lawyer should ever undertake to draw. But there are others, common in the commercial world, and fraught with substantial legal consequences, that lawyers seldom are employed to draw, and that in the course of recognized occupations other than the practice of law are often drawn by laymen for other laymen, as has already been shown. The actual practices of the community have an important bearing on the scope of the practice of law. *People v. Alfani*, 227 N.Y. 334, 339, 125 N.E. 671; *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 377, 379, 125 N.E. 666.

"We think that the preparation of the income tax returns in question, though it had to be done with some consideration of the law, did not lie wholly within the field of the practice

of law. See Shortz v. Farrell, 327 Pa. 81, 92, 193 A. 20; Blair v. Motor Carriers Service Bureau, Inc., 40 Pa. Dist. & Co. R. 413, 422 429, 430; Gustafson v. C. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 436; Crawford v. McConnell, 173 Okl. 520, 523, 49 P.2d 551; In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157, 73 A.L.R. 1323; In re Matthews, 58 Idaho 772, 79 P.2d 535; Id., 57 Idaho 75, 62 P. 2d 578, 111 A.L.R. 13, and note at page 29; Note, 125 A.L.R. 1174 et Seq. * * *

We believe that, in the above case, the court manifested a reluctance to rule that the preparation of income tax returns of a more complex nature would not constitute the practice of law. In this connection it is worthwhile to quote from the dissenting opinion in the Merrick case, supra, where it is said at l. c. 287:

"With respect to taxation: Many aspects of tax work do not require the knowledge and skill of the lawyer as distinguished from that of the businessman or accountant. It seems probable, however, that to advise concerning what constitutes income for purposes of taxation would require substantial professional knowledge of the detail of judicial decisions and skill in applying them to the tax facts of a particular customer's affairs. It seems probable further that the giving of information concerning tax statutes and regulations would require the exercise of professional understanding of judicial decisions construing them.* * *"

Sections 13313 and 13314, supra, and the cases herein cited, pertain to and treat the problem of laymen engaging in unauthorized practice of law. Admittedly, the cases relating to the preparation of income tax returns indicate that the preparation of state and federal income tax returns does not constitute the practice of law insofar as they may be prepared by laymen, however, we are inclined to believe that the decisions of those cases would not be an absolute basis for permitting a magistrate, compensated by salary, to fill out tax returns for individuals for compensation.

It is a matter of common knowledge that in the past few years the number of people paying income tax and filing returns has tremendously increased, lawyers all over the country have acquired additional business and more clients as a result of persons retaining them to prepare their income tax returns and a lawyer considers such tax work as much a part of his law business as the preparation or drafting of other legal papers and documents.

The constitutional and statutory provisions do not prohibit magistrates from practicing law or doing business for the reason that they are unqualified to handle such affairs, and to do so would make them subject to prosecution, but the purpose of these prohibitions is to keep the standard of the judiciary high and so that magistrates, who preside over their respective courts, may do so with the highest degree of impartiality.

Regarding the preparation of state income tax returns by a magistrate, it is conceivable that a magistrate may sometime find himself in the embarrassing position of having litigation in his court dealing with the payment of state income tax or a penalty and involving a state income tax return that he had advised his client about and had prepared. In such an instance he would probably be disqualified to rule on the question before him.

In construing a constitutional and statutory provision it is a primary rule that we must determine and adhere to the intent of the law-makers.

In the case of State v. St. Louis Union Trust Co. 335 Mo. 845, 74 S. W.(2d) 348, the court said at S. W.(2d) l. c. 357:

"It must be remembered that we are construing a statute enacted under the police power and primarily intended to protect the public from the rendition of certain services, deemed to require special fitness and training on the part of those performing the same, by persons not lawfully held to possess the requisite qualifications. While its penal provisions should be strictly construed, the statute as a whole should be interpreted, if possible, so as to effectuate the legislative intent. * * *"

Looking to the intent of the framers of the Constitution we quote from the Journal of the Constitutional Convention where, on the 151st day, May 31, 1944, at page 2764, Mr. Phillips, a delegate from St. Louis, said the following in connection with the drafting of Section 24, Article V of the Constitution, supra:

"Now, not only does his amendment undo all of the good work of the Committee but if you look through the mud, you will see a nice little clause here that has been eliminated that a whole lot of people want eliminated and that is the clause that says that no judge or magistrate shall practice law or do law business. Mr. President, that is one of the most important provisions of this section. We had quite an argument about it in the Committee. It was shown there that some of our judges were receiving secret fees for their services doing law business while they were still judges of our courts. I don't have to make that any plainer. That is pretty plain. If somebody wanted to influence a decision of the judge, all he had to do was to hire him to do a little law business on the side and the judge would be friendly to every case of that man that came into his court. The whole purpose of this judicial article is to raise the standard of our judiciary and put them above small things like accepting fees, both public and private, and pay salaries, make them efficient and honorable men. The amendment strikes all that out, and I think it is bad.

Section 25, Article V, Constitution of 1945, and Section 2811.103 R. S. A., supra, provide that persons must be licensed to practice law to qualify for the office of magistrate unless they were justices of the peace on February 27, 1945, the date of the adoption of the Constitution, or have heretofore been justices of the peace in this state for at least four years. The ultimate result of these constitutional and statutory provisions relating to the qualifications of magistrates would be to make all magistrates lawyers. In other words at sometime in the future all former justices of the peace will be gone and the only persons who will be able to qualify for the office of magistrate will be those who are licensed to practice law within the state. Therefore, in many instances magistrates will be lawyers duly licensed to practice law who will have a law practice at the time they assume the duties of their office. We do not believe that, under the constitutional and statutory provisions prohibiting magistrates to practice law or do law business, the framers of the Constitution and the legislators, intended that a lawyer, who is elected magistrate, should be

permitted to continue handling what he has undoubtedly considered as part of his law business, viz, the preparation of state and federal income tax returns, and receive his customary fees for making them out.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the preparation of state and federal income tax returns by magistrates for compensation would constitute the doing of law business under Section 24, Article V of the new Constitution and Section 2811.103, Missouri Revised Statutes, Annotated, and as such is prohibited.

APPROVED:

Respectfully submitted,

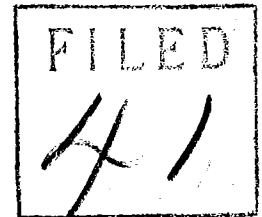
J. E. TAYLOR
Attorney General

RICHARD F. THOMPSON
Assistant Attorney General

RFT:mw

MISSOURI REAL ESTATE COMMISSION: Authority to promulgate regulations requiring proof of registration of fictitious name as a condition precedent to securing Missouri real estate broker's license.

January 28, 1946



Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter of January 24, 1946, requesting an official opinion of this office, and reading as follows:

"May this Commission ask you for an opinion in regard to this Commission making rules and regulations regarding licensees using trade names. There are a great many individual brokers who apply for licenses desiring to have them issued as doing business as some realty company.

"This inquiry is prompted by the fact that the person who is actually licensed does not identify himself with the trade name, and the Commission feels that a person should identify himself with the trade name used, to protect the general public."

There is no question with regard to the right of the Missouri Real Estate Commission to promulgate reasonable rules and regulations looking toward the enforcement of the Missouri Real Estate Brokers' and Salesmen's Licensing Law. Such authority is contained in Section 4 of the Act of the General Assembly found in Laws of Missouri, 1941, page 424, from which we quote, in part:

" * * * said commission may do all things necessary and convenient for carrying into effect the provisions of this act, and may

from time to time promulgate necessary rules and regulations compatible with the provisions of this act. * * * "

In making such rules and regulations, however, certain restrictions upon the Commission must be noted. We direct your attention in that regard to the following found in 59 C. J., "States," page 112:

"Powers granted to state administrative agencies must be exercised in a just and reasonable manner, and in conformity with the statutory or constitutional source of the power conferred."

It then becomes pertinent to make some inquiry into the reasonableness of the proposed rule. It may be conceded that citizens of the State of Missouri may adopt a fictitious name and conduct their business thereunder. We quote from *Bassen v. Monckton*, 308 Mo. 641, 1. c. 650:

" * * * Further, the statute does not prohibit them from adopting a fictitious name and trading under it. The statute requires only that they register the fictitious name if they use one. It prohibits them from using it without registration and provides a fine for failure to comply."

The statutes there being considered are now found as Sections 15466 to 15470, inclusive, R. S. Mo. 1939. These statutes, respectively, read as follows:

Sec. 15466. "That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required."

Sec. 15467. "Every person who shall engage in business in this state under a fictitious name or under any name other than the true name of such person shall, within five days after the beginning or engaging in business

under such fictitious name, register by verified statement of all parties concerned, upon blanks furnished by the secretary of state, such name in the office of the secretary of state, together with the name or names and the residence of each and every person or corporation interested in or owning any part of said business, and setting forth the exact interest therein of each and every such person or corporation: Provided, that if the interest of any person named in the original registration of such fictitious name shall change or cease to exist, or any other person shall become interested therein, such fictitious name shall be reregistered within five days after any change shall take place in the ownership of said business or any part thereof as set forth in the original registration, and such reregistration shall in all respects be made as in the case of original registration of such fictitious name: Provided, that the provisions of this section shall not apply to farmers' mutual insurance companies nor farmers' mutual telephone companies."

Sec. 15468. "For the registration of each fictitious name as in this article required, there shall be paid into the state treasury a fee of two dollars."

Sec. 15469. "Any person who shall engage in or transact any business in this state under a fictitious name, as in this article defined, without registering such name as herein required, shall be deemed guilty of a misdemeanor."

Sec. 15470. "For the purposes of this article the word 'person' shall be construed to include both male and female, plural and singular, partnerships, associations and corporations, as the circumstances of the case may require."

By reason of the enactment of these statutes, it is disclosed that the public policy of the State of Missouri, speaking through its legislature, is to require persons, partnerships,

associations and corporations engaged in business in the State of Missouri under a fictitious name to register such fictitious name with the proper officials, and to provide a penalty for failure to do so. Considering the proposed regulation in the light of this declared public policy of the state, we are persuaded to the view that such a rule would be deemed just and reasonable as being one designed only to require persons seeking real estate licenses under fictitious names to comply with the statutory requirements.

CONCLUSION

In the premises, we are of the opinion that the Missouri Real Estate Commission has the authority to promulgate a rule requiring persons, partnerships, associations or corporations seeking to be licensed to do a real estate business within the State of Missouri to disclose and prove, as a condition precedent to the obtention of such license, that such person, partnership or corporation has complied with the requirements of the statutes relating to the registration of fictitious names.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

MISSOURI REAL ESTATE
COMMISSION:

Fees to be charged for real estate
licenses issued to copartnerships,
associations or corporations.

March 30, 1946

FILED

41

4-2

Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter requesting an official opinion of this office, and reading as follows:

"May the members of the Missouri Real Estate Commission request an opinion in regard to the wording of Section 2 and Section 9 in regard to a fee for a copartnership, association or corporation, as it appears the wording of these sections may be ambiguous. The Commission is interested in defining what the correct charge should be for the corporation, co-partnership or association license."

The sections referred to in your letter of inquiry are found in Laws of Missouri, 1941, page 424, and read as follows:

"Section 2. A corporation, copartnership or association shall be granted a license when individual licenses have been issued to every member or officer of such copartnership, association or corporation who actively participates in its brokerage business, and to every person who acts as a salesman for such copartnership, association or corporation." (Emphasis ours.)

"Section 9. The annual fee for a real estate broker's license shall be \$5.00.

When issued to a copartnership, association or corporation, there shall be an additional annual fee of \$2.00 for each member or officer who actively participates in the real estate business. The annual fee for such real estate salesman's license shall be \$2.50. * * * " (Emphasis ours.)

Your attention is further directed to a portion of Section 3 of the Act, which reads as follows:

"Section 3. A real estate broker is any person, copartnership association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a LICENSED real estate broker or dealer * * *."

It is, of course, a primary rule of construction of statutes that the intent of the law making body be ascertained. We quote from American Bridge Co. v. Smith, 179 S. W. (2d) 12, 1. c. 15:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the 'manifest purpose of the statute, considered historically,' Cummins v. Kansas City Public Service Co., 334 Mo. 872, 66 S. W. 2d 920, 925; Artophone Corporation v. Coale, 345 Mo. 344, 133 S. W. 2d 343."

Further, your attention is directed to a portion of Section 655, R. S. Mo. 1939, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be

understood according to their technical import; * * * "

Examining the sections of the Missouri Real Estate Commission Law referred to in your letter, we find that there are no words of technical or peculiar meaning used therein. In accordance with the above cited declaration of principle and the statute quoted, we must look to the common and ordinary meaning of the words used therein.

Section 2 plainly provides that a corporation, copartnership or association shall be granted a license only when individual licenses have been secured by every member or officer of such organization and by each person acting as a salesman for such organization. This is but in accordance with the entire scheme of licensing of persons engaged in the real estate business, and simply requires those persons who act in other than their individual capacity to conform with the requirements imposed upon persons acting as individuals.

Section 9 provides that the fee for any person securing such an individual broker's license shall be \$5.00 per annum, and that the fee for each real estate salesman's license shall be \$2.50. In the light of the definition of "real estate broker" found in Section 3, quoted supra, it is apparent that the corporation, copartnership or association must also secure a real estate broker's license in its corporate or partnership entity. After having provided for these fees, the Legislature has specifically provided, in the second sentence of Section 9, for an "additional" annual fee of \$2.00 for each member or officer who actively participates in the business of the organization.

"Additional" is defined in Webster's New International Dictionary, Second Edition, as follows: "added; coming by way of addition; extra." Applying this definition of the term to the language used in the second sentence of Section 9, we immediately discover the legislative intent to impose extra fees upon persons acting as members or officers of a copartnership, association or corporation, over and above those charged persons acting in their individual capacity.

CONCLUSION

In the premises, we are of the opinion that the aggregate fees to be charged a newly formed corporation, copartnership or

association are to be determined by totalling the sums of \$5.00 for the corporation, copartnership or association license, \$2.00 for each of such members or officers who shall actively participate or engage in the real estate business conducted by such corporation, copartnership or association, together with the sum of \$2.50 for each salesman employed by such corporation, copartnership or association. It is, of course, necessary that each member or officer of such corporation, copartnership or association shall also have the individual broker's license required by Section 2 of the Act.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

SAVINGS AND LOAN SUPERVISION: Supervisor and assistants not entitled to pay from January 12, 1946 to January 28, 1946.



April 23, 1946

Honorable F. M. Horton, Supervisor
Division of Savings and Loan Supervision
State Office Building
Jefferson City, Missouri

Dear Sir:

Receipt of your request for an opinion is hereby acknowledged and reads as follows:

"We have been requested by the Auditor's Office to ask the opinion of the Attorney General regarding pay for the Supervision of Savings and Loan, from the time the old Bureau of B. & L. Supervision was abolished to the confirmation by the Senate of Mr. F. M. Horton as Supervisor of the new Division of Savings and Loan Supervision (Mr. Horton was also Supervisor of the defunct Bureau) - Jan. 12 to Jan. 28, 1946.

"The entire force worked during the 'interregnum,' not even the sponsors of the bill, H. B. #481, having realized that there might be the gap between the old and the new.

"Please also furnish the Auditor's office with a copy of the opinion herein requested."

House Bill 481 has been in full force and effect since the date of its approval by the Governor on January 12, 1946, due to the fact of an emergency clause included therein.

Among other sections of the statutes which were repealed by House Bill 481 was Section 8193, R. S. Mo. 1939,

which section created the Bureau of Building and Loan Supervision, and in its stead the Division of Savings and Loan Supervision was created. Section 3 of House Bill 481 provides:

"There is created a state division of savings and loan supervision, which shall be under the management and control of a chief officer who shall be called the supervisor of savings and loan associations. The supervisor of savings and loan associations shall maintain his office at Jefferson City, Missouri, and shall devote all of his time to the duties of his office. The board of the permanent seat of government shall provide the supervisor of savings and loan associations and the state division of savings and loan supervision with suitable office rooms."
(Underscoring ours.)

With regard to the repeal and reenactment of statutes bearing upon the same subject matter, the rule was adopted in Missouri in the case of Belfast Investment Co. v. Curry, 175 S. W. 201, 264 No. 483, 1. c. 496, as follows:

"The usual rule is that when part of a former act is repeated in an amendatory statute, the provisions thus repeated are considered as a continuation of the former law, and not as a new enactment; while those parts of the original act which are omitted from the amendment are treated as repealed. This rule is announced by Lewis-Sutherland in the second edition of his work on Statutory Construction, vol. 1, pp. 442-3, as follows:

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed

portions are not to be taken to
have been the law at any time prior
to the passage of the amended act."
(Underscoring ours.)

It may therefore be said that the Legislature has established a wholly new state agency by Section 3 of House Bill 481. This is especially true by the wording of this section, which commences "There is created a state division of savings and loan supervision," which establishes the intent of the Legislature that this division shall be a new agency.

Thereafter, Section 4 of House Bill 481 provides:

"The supervisor shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold office at the pleasure of the Governor. No person shall be eligible for appointment to such office unless he has had at least two years experience as director, officer, employee or examiner of savings and loan associations."

Until such time as the new supervisor is appointed there can be no one in a position who is to be recognized as having title to that office.

You have stated in your request that "the entire force worked during the 'interregnum,'" and in the process of doing such work no doubt undertook to accomplish the ordinary business of the Division of Savings and Loan Supervision. It therefore becomes pertinent to determine the status of those who were carrying on this work.

Section 6 of House Bill 481 provides:

"The supervisor, with the approval of the Governor, shall appoint such assistants including not to exceed six examiners, and such clerks, stenographers and other necessary employees as he shall deem necessary to properly discharge the duties of his office. Each such assistant shall perform such duties as the supervisor

shall require, devote all of his or her time to such official duties and hold office at the pleasure of the supervisor. One-half of said examiners shall be members of and affiliated with the political party casting the highest number of votes for governor at the last preceding state election and one-half of said examiners shall be members of and affiliated with the party casting the next highest number of votes in this state for governor at the last preceding state election."

None of the assistants or other employees referred to in this section could be appointed until after the supervisor had been approved by the Senate because until then there was no one in a position to make such appointments.

Conclusion

It is, therefore, the opinion of this department that Mr. F. M. Horton is not entitled to be paid as Supervisor of the Division of Savings and Loan Supervision between the dates of January 12, 1946 and January 28, 1946, because until the latter date he had not been confirmed by the Senate as required by Section 4 of House Bill 481.

It is our further opinion that the assistants and other employees of the Division of Savings and Loan Supervision are not entitled to be paid as such between the dates of January 12, 1946 and January 28, 1946, because they could not be appointed under Section 6 of House Bill 481 until the Supervisor was confirmed by the Senate.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

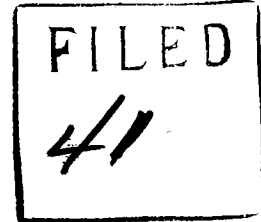
J. E. TAYLOR
Attorney General

MISSOURI REAL ESTATE
COMMISSION:

Effect of entry of plea of nolo contendere, followed by probation, upon right of a person to obtain or retain a real estate broker's or salesman's license.

June 17, 1946

Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri



Attention: Mr. J. W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter of recent date, requesting an opinion of this office, and reading as follows:

"May this Commission request an opinion from your office in regard to an applicant for a real estate license who has been indicted in the Federal and Civil Court on a plea of guilty or Nolo Contendere that is not sentenced, but is put on probation which he serves and is released. Would it be mandatory under Section 14 of the Real Estate License Law to deny such a person a license?"

Section 14 of the Missouri Real Estate Commission Act, found in Laws of 1941, pages 424 to 431, inclusive, reads as follows:

"Where during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to

the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly." (Emphasis ours.)

From the above, it is apparent that the answer to your inquiry resolves itself into a determination of whether or not, by entering a plea of nolo contendere, following which the accused is placed on probation by the court, such accused has thereby been "convicted" of the crime with which he stood charged, within the meaning of the term as used in the Missouri Real Estate Commission Act.

We are of the opinion that such proceedings do not amount to a conviction of the accused such as to require the mandatory denial of such person's application for a real estate broker's or salesman's license. We direct your attention to Meyer v. Missouri Real Estate Commission, 183 S.W. (2d) 342, wherein the Kansas City Court of Appeals made the following comment with respect to what does constitute a "conviction" under the precise section of the Missouri Real Estate Commission Act referred to in your letter:

"Under the weight of authority it is held: 'That where the context of the statutes refers to the successive steps in a criminal case, or any particular stage of such a prosecution, as distinguished from the others, these words apply simply and solely to the verdict of guilty; but where the reference is to the ascertainment of guilt in another proceeding, in its bearing upon the status or rights of the individual in a subsequent case, then a broader meaning attaches to the expressions, and a "conviction" is not established or a person deemed to have been "convicted" unless it is shown that a judgment has been pronounced upon the verdict.' People v. Fabian, 192 N.Y. 443, 85 N.E. 672, 675, 18 L.R.A., N.S., 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100. See, also, Smith

v. Commonwealth, 134 Va. 589, 113 S.E. 707, 24 A.L.R. 1286. * * *

"And the authorities are very numerous and practically unanimous in their holding to the effect that, under statutes disqualifying persons from testifying as witnesses who have been convicted of crimes mentioned in the statute, the disqualification does not arise upon the mere conviction of the crime by the verdict of the jury, but only where there has been a judgment of conviction, without which, as is uniformly held, there has been no conviction within the meaning of such statutes. 1 Bish. New Cr. Law (8th Ed.) sec. 975; 7 Am. & Eng. Ency. L. (New Ed.) pp. 498-502, and note 1 on page 502; People v. Whipple, 9 Cow. (N.Y.) 707; Fitch v. Smallbrook, T. Raym. 32; Rex v. Castell, 8 East. 77; State v. Damery, 48 Me. 327; (Jackson ex dem.) Gibbs v. Osborn, 2 Wend. (N.Y.) 555, 20 Am. Dec. 649; Dawley v. State, 4 Ind. 128; Commonwealth v. Gorham, 99 Mass. 420; Marion v. State, 16 Neb. 349, 20 N.W. 289; Bishop v. State, 41 Fla. 522, 26 So. 703; 16 C.J. 1341 (3) (24 C.J.S., Criminal Law, sec. 1960, subd. f).

"In Bish. New Cr. Law (8th Ed.) sec. 975, just cited, this is said:

"Judgment necessary.--A mere plea or verdict of guilt works no infamy, for until judgment it has not reached the conclusion of guilt. So that this disqualification (to be a witness), like common-law forfeiture, does not come from the mere crime, or the mere conviction of it, or the punishment, but from the final judgment of the court. Until judgment, the accused or indicted person is competent to testify"--citing numerous cases in England as well as in the United States.

"There is the same practically unanimous holding of the authorities where the statute disqualifies from voting persons convicted of crimes mentioned in the statute. Gallagher v.

State, 10 Tex. App. 469; Egan v. Jones, 21 Nev. 433, 32 P. 929; People v. Fabian, 192 N. Y. 443, 85 N.E. 672, 18 L.R.A., N.S., 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100.

"By the great weight of authority there is the same holding as to the necessity of a judgment of conviction to bring the case within the meaning of "convicted" or "conviction" in statutes imposing any punitive consequences as the result of the conviction of the offense mentioned in such statutes.

* * * * *

"Where the context in which the word is found concerns, not merely the particular case, but the effect of the conviction of the accused in one case, when pleaded or given in evidence in another, the word "conviction," or "convicted," is more comprehensive and includes the judgment of the court upon the verdict or confession of guilt.'

"See, also, Faunce v. People, 51 Ill. 311; State v. La Rose, 71 N.H. 435, 52 A. 943; Commonwealth v. Lockwood, 109 Mass. 323, 329, 12 Am. Rep. 699; I Bishop on Criminal Law, sec. 975 (8th Ed.)

* * * * *

"We have been cited to no authority holding that the suspension of the imposition of the sentence, or the suspension of the sentence, itself, upon a plea or a verdict of guilty, and the placing of the defendant upon probation is a final judgment within the meaning of the statutes giving effect to such proceedings in another proceeding.

"It is held that where there has been a suspended sentence there is no final judgment. People v. Page, supra, 125 Misc. 538, 211 N.Y.S. 401, loc. cit. 403; 24 C.J.S., Criminal Law, secs. 1571, 1618, pp. 47, 187. If this is so it would seem that, certainly, where there has been no sentence at all but merely a suspension of the imposition of sentence,

as in this case, there has been no such judgment.

"We are of the opinion that the word 'conviction', as used in the Missouri Real Estate Commission Act, should be taken in its most comprehensive sense, that is, to include the judgment of the court upon a verdict or confession of guilt.

"We have heretofore approached this subject from a more or less technical viewpoint but there are practical considerations as to why the word 'conviction' in the statute before us should be taken in its broader sense. In this connection we wish to review to some extent the Federal Probationary Act to ascertain what effect is to be given to the order suspending the imposition of sentence and placing the defendant on probation as related to the question as to whether any final judgment has been rendered when such a course of action has been taken by the court.

"Section 724, Title 18 U.S.C.A. provides that 'When it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby (the court) shall have power * * * to suspend the imposition or execution of sentence and to place the defendant upon probation.'

"The statutes providing for suspension of sentence and probation are said to be remedial and hence are to be liberally construed.' 24 C.J.S., Criminal Law, sec. 1571, p. 55.

"In Riggs v. United States, 4 Cir., 14 F. 2d 5, 9, the court said the federal act is to be viewed as 'having regard to its general purposes, and the wise and humane things that should be done in its due administration, looking to the amelioration of the condition of the unfortunate in whose behalf it was enacted. The purpose of the act was to give to the federal District Courts a free hand in humanely dealing with criminal classes which come before

them, and much discretion, of course, should be allowed, having regard to the offenses charged,' etc.

"In Zerbat v. Kidwell, 304 U. S. 359, 58 S. Ct. 872, 874, 82 L. Ed. 1399, 116 A.L.R. 808, the court said: 'Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency-- under guidance and control of the Board.'

"The evidence shows that the business of plaintiff herein is that of a real estate broker, and it would appear that to deprive him of his occupation might well shut the door of opportunity against him and impede, if not prevent, his restoration to society as a good social risk. In cases where the defendant is put upon probation the federal court, no doubt, finds that there are circumstances surrounding the life of the defendant to lead it to believe that he will be a good risk for reformation. If this is true it appears to us that his future should not be clouded by depriving him of his occupation. Consequently, having in mind the beneficent purposes of the Federal Act we are of the opinion that it was not intended by Congress that a suspension of imposition of sentence and placing of defendant on probation should be construed to be a final judgment of conviction in the case such as to work injury to him in another proceeding. It might be further observed that while the probationary period is running in these cases it may appear to the federal court that the best interests of the public and the defendant would be served by modifying the conditions of the probation, as for instance, changing the period, Scalia v. United States, 1. Cir., 62 F. 2d 220, or defendant may be discharged altogether from supervision and the proceedings terminated against him as provided by sections 724, 725 of the Federal Statute, or, the court may see fit, in order to remove the stain, as far as possible, of the record made in the case against plaintiff, to dismiss the proceedings against him entirely.

* * * * *

"As long as it is within the province of the federal court to dismiss the criminal proceedings against the plaintiff herein, it can hardly be said that there has been a final judgment of conviction.

* * * * *

" * * * The rule is well stated in People v. Fabian, supra, as follows: 'Where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'"
(Emphasis ours.)

CONCLUSION

In the premises, we are of the opinion that the entry of a plea of nolo contendere to a charge of one of the offenses specified in Section 14 of the Missouri Real Estate Commission Act, which is followed by the defendant being placed upon probation, does not constitute a conviction of such person.

We are further of the opinion that, under such circumstances, it is not the mandatory duty of the Missouri Real Estate Commission to deny the application of such person for a real estate broker's or salesman's license.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

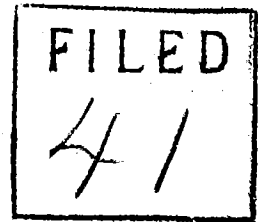
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Liability for taxation of royalties received from lease of patent.

August 29, 1946



Mr. Haskell Holman, Supervisor
Intangible Personal Property Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you please furnish this Department with an opinion as to whether royalties received from a lease of a patent should be included in the intangible property tax, as set forth in House Bill #868, of the present Missouri General Assembly."

H.C.S.R.B. 868, of the 63rd General Assembly, provides the complete scheme for the assessment, levying and collection of property tax on intangible personal property. Included therein is Subsection (B) of Section 1, wherein "intangible personal property" is defined. Such definition appears in the following language:

"Intangible personal property means moneys on deposit; bonds (except those which under the constitution or laws of the United States may not be made the subject of a property tax by the State of Missouri); certificates of indebtedness (other than capital notes issued by banks or trust companies); notes, debentures, annuities, accounts receivable; conditional sales contracts (which have incorporated therein promises to pay) and real estate and chattel mortgages."

It, therefore, becomes of prime importance to determine whether or not "royalties" are included within the statutory

definition of "intangible personal property."

The following definitions of the term "royalties" are found in Words and Phrases, Vol. 37, Permanent Edition, page 809:

"A royalty is a tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article. *Hubenthal v. Kennedy*, 39 N.W. 694, 695, 76 Iowa, 707.

"'Royalty,' applied to patent, is tax or duty, paid to owner of patent for privilege of manufacturing or using patented article, but may be applied to nonpatentable improvements. *Volk v. Volk Mfg. Co.*, 126 A. 847, 849, 101 Conn. 594."

With these definitions in mind, we have re-examined the statutory definition of "intangible personal property" set out supra. The contract providing for the royalties arising from the use of a patent is, of course, not included within either "moneys on deposit," "bonds," "certificates of indebtedness," "notes," "annuities," "conditional sales contracts," or "real estate and chattel mortgages." We then necessarily must determine whether or not such contract is included within the definition of the other forms of intangible personal property set out in the statute.

The following definition of "debenture" is found in Words and Phrases, Vol. 11, Permanent Edition, page 187, citing a Missouri case:

"'Debentures may be defined as instruments under seal, creating a charge according to their wording upon the assets specified therein of the corporation, and, to that extent, conferring upon the grantees a priority over other subsequent creditors or existing creditors not possessed of such a charge. Under this term, however, are often included two other varieties of instruments which do not answer this definition strictly. There are consequently

three varieties of debentures. I. Instruments which do not confer a charge, and which are nothing more nor less than ordinary bonds and ought to be so styled. II. Debentures in the true and proper sense. III. Instruments which contain more than a mere charge, which are mortgages in fact, and which, from possession in addition thereto, the characteristics of debentures may be for convenience, and often are, called mortgage debentures. *Lorimer v. McGreevy*, 84 S.W. (2d) 667, 669, 229 Mo. App. 970."

The following definition of "accounts receivable" is found in Words and Phrases, Vol. 1, Permanent Edition, page 547, citing a Missouri case:

"'Accounts receivable,' which are amounts owing to a creditor on open account, being in the nature of 'credits' and 'personal property,' within Rev. St. 1919, Section 12967, are taxable, under section 12766, as amended by Laws 1923, p. 375, Mo. St. Ann. Sections 9977, 9756, pp. 8015, 7872, providing that certain enumerated property shall be listed for taxation, and that every other species of property not exempt shall be returned for taxation; rule of ejusdem generis being inapplicable. *State ex rel. Globe-Democrat Pub. Co. v. Gehner*, Mo., 294 S.W. 1017, 1018."

It is our opinion that neither of the quoted definitions are broad enough to include a contract under which royalty payments are made for the use of a patent; and that such contract, therefore, is not within the statutory definition of intangible personal property. Since the General Assembly has not included in the enumeration of intangible personal property, we think the following rule declared by the Supreme Court of Missouri in *Valle v. Ziegler*, 84 Mo. 214, l. c. 219, to be applicable:

" * * * In order that property may be taxed, it must, by law, be subjected to taxation. It is not sufficient that the legislature might have subjected it to taxation. The State v. The St. L., K. C. & N. Ry. Co., 77

No. 202. The general assembly has declared what property of the citizen shall be embraced in his tax list, and this property is not named. * * *

" * * * It does not follow, because it would be constitutional to tax both the property and capital stock of such companies, that both may be assessed for taxation, although no act of the general assembly authorizes it."

From the quoted portion of the above opinion, it is clear that only such property as has been subjected to taxation by the General Assembly is liable therefor, and reference to the quoted portion of H.C.S.L.B. 868, of the 63rd General Assembly, indicates that with respect to royalties of the type described in your letter of inquiry, the General Assembly has not subjected such royalties to taxation.

CONCLUSION

In the premises, we are of the opinion that royalties received from a lease of a patent are not subjected to the Missouri intangible personal property tax law for the reason that such royalties are not included within the definition of intangible personal property found in the act.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:LR

MISSOURI REAL ESTATE
COMMISSION:

Status of person convicted in Federal Court
and subsequently pardoned by President
with respect to right to license under the
Missouri Real Estate Commission Act.

October 7, 1946



Mr. J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Enclosed kindly find a letter from Maurice H. Winger, attorney to Chairman O'Flaherty in which he requests that the Commission submit the matter of Wilbur J. Mansfield of Kansas City Missouri to your office for an opinion in regard to an applicant who has been convicted by the court and was later given a full pardon by the President of the United States.

"Enclosed kindly also find a letter from Mr. Winger to Mr. C. L. Flaugh, Commission Kansas City Investigator for Jackson County. Both letters are self-explanatory.

"There are several realtors in Kansas City that are interested in Mr. Mansfield and will you kindly review the letters and send the Commission your opinion."

The letter referred to in your inquiry, written by Maurice H. Winger to the Missouri Real Estate Commission, contains no matters germane to the consideration of the legal aspects of the question, and amounts only to a request that the matter be submitted to this office for such an opinion.

Mr. J. W. Hobbs - 2

However, in the letter from Mr. Winger to Mr. C. L. Flaugh, the local investigator of the Real Estate Commission, in Kansas City, Missouri, which is also referred to in your letter of inquiry, we note the following pertinent statement:

"Mr. Mansfield's application will necessarily show that he was convicted in November, 1933 in the Federal Court on an indictment charging him with being a party to a scheme to defraud and using the United States Mails in connection with said scheme."

Also, the following:

"A full pardon was granted on this application."

The question presented, then, is whether or not Mr. Mansfield is now entitled to a license under the Missouri Real Estate Commission Act, found in Laws of 1941, page 424, in view of the fact of his conviction of the crime mentioned and his subsequent pardon by the President of the United States.

Section 14 of the Missouri Real Estate Commission Act provides, in part, as follows:

" * * * No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

It is noted that the crime of which the applicant was convicted is one falling within the list of those enumerated in Section 14, quoted supra. An examination of the Act in its entirety does not disclose that any provision for restoration of the right to again be licensed has been made in the event of a pardon, as has been done with respect to restoration of the right to vote, to serve on juries, etc., in other instances. The sole question remaining, then, is whether or not the presi-

dential pardon had the effect of restoring the applicant to a status in which he may be licensed.

We believe that the Supreme Court of this state would follow that definition of "pardon" which gives it the legal effect of "forgiveness" but not "forgetfulness." That such is the proper construction is indicated in *State v. Jacobson*, 152 S. W. (2d) 1061, from which we quote:

"In *Lime v. Blagg*, 345 Mo. 1, 131 S. W. 2d 583, 585, the court en banc gave approval to definitions of the term 'pardon,' as follows: 'A pardon, as defined in 20 R.C.L. sec. 1, p. 521, is "a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime;" or, as stated in 46 C. J. sec. 1, p. 1181, "a pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." Moreover, 'as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt.' 46 C. J. sec. 32, p. 1193. A pardon 'carries an imputation of guilt; acceptance a confession of it.' 20 R.C.L. sec. 4, p. 523. (Italics ours.) A pardon 'affirms the verdict and disaffirms it not.' *Searle v. Williams*, Hob. 288, 293.
* * * "

The *Jacobson* case was criminal in nature, but that the same rule would be applied in proceedings of a civil nature appears from *Hughes v. State Board of Health*, 159 S. W. (2d) 277. In this case the relator, who had previously been a licensed physician of the State of Missouri, was seeking to have set aside a revocation made by the State Board of Health. The revocation was based upon a conviction in Federal Court of the relator of a felony, for which he had been subsequently pardoned by the President of the United States. The fact of the conviction had been considered by the Board in determining that relator was not of "good moral character," and relator contended that such consideration was improper in view of his having been the recipient of the presidential pardon. In disposing of this contention, the court said, 1. c. 279:

"The fact that respondent received a presidential pardon, full and unconditional, in no way affects the situation before us. It cannot be construed as restoring good character. Generally speaking, a pardon 'is an act of grace * * * which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.' *Lime v. Blagg*, 345 Mo. 1, 131 S. W. 2d 583, 585, quoting from 46 C. J. 'Pardons' sec. 1. Whether an unconditional pardon had the effect of restoring to one convicted of a crime a license to practice the art of healing revoked because of such conviction was considered in *State v. Hazzard*, 139 Wash. 487, 247 P. 957, 959, 47 A.L.R. 538. In a well-reasoned opinion the court concludes that a pardon merely restores civil rights and not the right to resume the practice of the art of healing. 'Our investigation has disclosed no decision by a court of last resort, other than *Ex parte Garland*, supra (4 Wall. 333, 18 L.Ed. 366 (previously distinguished)), holding that it further restores the extraordinary right to practice any of those professions which, because of their peculiar relation to the public, require that those holding licenses must have the important qualification of good character.' The annotation in 47 A.L.R. 542 points out that this decision is in accord with the rule applicable to officeholders (including lawyers in that category) which holds the forfeited office is not restored by reason of the pardon. *Page v. Watson*, supra, dealt with the same question and reached the same conclusion.

"Clearly the conviction of respondent of the crime of using the mails to defraud constituted evidence of bad moral character sufficient to sustain the action of the board in revoking his license. Respondent did not contend otherwise, but relied on the pardon to overcome the effect of the conviction. This he may not do." (Emphasis ours.)

That the effect of a pardon is not to remove the fact of the "conviction," but goes only to the restoration of the civil

rights and the forgiveness of punishment, is indicated by the provisions of Section 4854, R. S. Mo. 1939, the habitual criminal act. This statute, imposing heavier punishments for those previously convicted of offenses punishable by imprisonment in the penitentiary, so indicates. We direct your attention to a portion thereof, reading as follows:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: * * *" (Emphasis ours.)

Inasmuch as the added penalty is, under the terms of the statute, brought about as a result of the prior "conviction," it clearly appears that the pardon does not, for the purpose of such imposition of additional punishment, destroy the effect of the prior conviction.

Although there are a few cases in other jurisdictions which indicate that the effect of a presidential pardon is to completely wipe out the conviction, as well as the penalties and forfeitures resulting therefrom, yet for the reasons mentioned above we do not believe that they would be followed in this state.

CONCLUSION

In the premises, we are of the opinion that a person convicted of a crime falling within the list of those enumerated in Section 14 of the Missouri Real Estate Commission Act, found in Laws of 1941, page 424, is not entitled to a license under said Act, even though such person may have been the recipient of a presidential pardon subsequent to such conviction, in the absence of action by the General Assembly

Mr. J. W. Hobbs - 6

granting restoration of all rights lost by reason of such conviction upon the receipt of such pardon.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Liability for Missouri intangible personal property tax of the St. Louis Bank for Cooperatives.

FILED

41

October 2, 1948

Mr. Haskell Holman
Supervisor, Income Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Please furnish this department with a written opinion as to whether or not the St. Louis Bank for Cooperatives would be subject to the provisions of either House Bill 868, 888 or 948."

House Bills 868, 888 and 948 of the 63rd General Assembly, referred to in your letter of inquiry, relate, respectively, to the method of imposing and collecting a tax upon the intangible personal property of individuals and certain other legal entities, to the taxation of banks in Missouri based upon their net incomes, and to the taxation of credit institutions based upon their net incomes. However, in the conclusion which we have reached in this matter, we deem it immaterial to quote the provisions of these various Acts.

The St. Louis Bank for Cooperatives has been organized under the provisions of the Farm Credit Act of 1933, Act June 16, 1933, of the Congress of the United States. Included in the Act authorizing the incorporation of such banks, we find Section 1138c of Title 12, U.S.C.A. We quote the following from this section:

* * * * Banks for Cooperatives, organized under this chapter, and their obligations,

shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Bank for Cooperatives or its property or income after the stock held in it by the United States has been retired." (Emphasis ours.)

This statute clearly has the effect of exempting the St. Louis Bank for Cooperatives from the imposition of the taxes levied under the provisions of the House Bills mentioned.

CONCLUSION

In the premises, we are of the opinion that the St. Louis Bank for Cooperatives is not subject to the taxes imposed by either House Bills 868, 888 or 948 of the 63rd General Assembly, unless the stock held in such bank by the United States has been retired.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

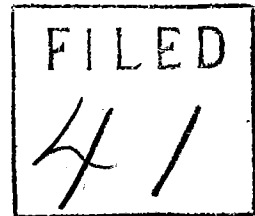
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Missouri sales tax properly deductible from bank tax computed under House Bill No. 888 of the 63rd General Assembly.

October 8, 1946



Mr. Haskell Holman
Supervisor, Income Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you furnish this department with a written opinion stating whether sales taxes would be a deductible item under Section 3, Sub Section E of House Bill #888 as passed by the present Missouri General Assembly."

House Bill No. 888 of the 63rd General Assembly, referred to in your letter, is one relating to the taxation of banks in Missouri. Paragraph E of Section 3 of the Act reads as follows:

"Each taxpayer shall be entitled to credits against the tax imposed by this Act for all taxes paid to the State of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the Unemployment Compensation Tax Law of Missouri, and taxes imposed by this Act, except that no credit shall be allowed for any tax paid by any such taxpayer in the year 1945 for its share holders based upon the value of its shares." (Emphasis ours.)

The correct answer to your question, then, is to be determined by whether or not Missouri sales tax is a "tax paid to the State of Missouri."

House Bill No. 652 of the 63rd General Assembly is the "Sales Tax Act." Examination of its provisions discloses that Section 11412 thereof reads as follows:

"It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by this article to pay the amount of such tax to the person making such sale or rendering such service; any person who shall wilfully and intentionally refuse to pay such tax shall be guilty of a misdemeanor."

Also, Section 11411 reads, in part, as follows:

"Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this article, or required to make collection of the tax imposed by the provisions of this article, shall be responsible not only for the collection of the amount of the tax imposed on such sale or service, but shall, on or before the 15th day of each month, make a return to the Director of Revenue of all taxes collected for the preceding month, or required to be collected for the preceding month, and shall remit the taxes so collected or required to be collected to the Director of Revenue. * * * "

Further, Section 11414 of the same Act reads as follows:

"All revenue collected or received by the Director of Revenue from the taxes imposed by this article shall be deposited in the State Treasury weekly to the credit of the ordinary revenue fund."

From the foregoing, it is readily apparent that the Missouri sales tax is imposed upon the purchaser of tangible personal property and of certain services as enumerated in the Act, and that although the tax itself is in the first instance paid to the retailer of such tangible personal property or services, it is by such retailer transmitted to the Director of Revenue, where it becomes a part of the ordinary revenue fund of the state.

Mr. Haskell Holman - 3

CONCLUSION

In the premises, we are of the opinion that Missouri sales tax paid during the relevant income period is a proper item of deduction against the tax on banks computed under the provisions of House Bill No. 888 of the 63rd General Assembly.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Determination of net income of pawnbrokers under House Bill No. 948 of the 63rd General Assembly.

FILED

41

October 28, 1946

11/9

Mr. Haskell Holman, Supervisor
Income Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is respectfully requested that you furnish this department with an opinion clarifying and determining the meaning of the words 'net income' as applicable to pawnbrokers under House Bill 948, Section 2 (a) which reads as follows:

"The term 'credit institution' means every person, firm, partnership, or corporation engaged principally in the consumer credit or loan business in the making of loans of money, credit, goods, or things in action, or in the buying, selling, or discounting of, or investing in, negotiable or non-negotiable instruments given as security for or in payment of the purchase price of consumer goods. Without limiting the generality of the foregoing, the term 'credit institution' shall include persons, firms, partnerships, and corporations, operating or licensed under the 'small loan laws' of this state, or under the laws of the state relating to 'loan and investment companies', and pawnbrokers, but shall not include banks, trust companies, credit unions, insurance companies, mutual savings and loan associa-

tions, building and loan associations, or real estate mortgage loan companies.'"

The "net income" of taxpayers subject to the provisions of House Bill No. 948 of the 63rd General Assembly is defined in Section 5 of the Act mentioned, from which we quote:

"(a) 'Net Income' means gross income as defined in paragraph (b) of this section minus the deductions allowed in paragraph (c) of this section.

"(b) 'Gross Income' includes all gains, profits, earnings and other income of the taxpayer derived from sources within the State of Missouri, during the income period, including but not limited to interest from obligations issued by the United States Government or any political subdivision or any instrumentality thereof, or any state or political subdivision thereof, or issued by any foreign country or nation or political subdivision thereof, all rents, compensation for services, commissions, brokerage and other fees, all gains or profits from the sale or other disposition of any property, real or personal, tangible or intangible; and all recoveries on losses sustained in the ordinary course of business subsequent to the effective date of this Act; provided, however, that recoveries on such losses sustained during any prior income period within which the deductions, as permitted by subsection (c) of this section, exceed the taxpayers' gross income for said income period, computed in accordance with this subsection, shall not be included in the taxpayers' gross income for the income period in which they were received to the extent of said excess. Dividends received on shares of stock of any Credit Institution liable to tax under this Act shall not be included in gross income.

"(c) In computing net income there shall be allowed as deductions all ordinary and necessary expenses paid or incurred by the taxpayer during the income period in carrying on its trade or business in the State of Missouri. Without limiting the generality of the fore-

going there shall be allowed as deduction: a reasonable allowance for salaries and other compensation for personal services actually rendered; rents, repairs, bad debts and debts ordered to be charged off by the Commissioner of Finance; interest, cost of insurance and advertising; all taxes paid or accrued during the income period to the United States and all taxes paid or accrued on real estate to the State of Missouri or any political subdivision thereof; all contributions paid or accrued pursuant to the Unemployment Compensation Law of Missouri; reasonable allowances for depreciation and depletion; amortization of premiums on bonds, debentures, notes or other securities or evidences of indebtedness; a reasonable allowance for payments or contributions to or on account of any pension or retirement fund or plan for its officers or employees; contributions to any corporation, association or fund organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual to an amount which does not exceed five per centum of the taxpayer's net income as computed without the benefit of this deduction; losses from the sale or disposition of any property, real or personal, tangible or intangible; and all other losses sustained during the income period not compensated for by insurance."

You will note that we have emphasized the words "taxpayer" and "its" in the foregoing quotation. We have deemed it advisable to do so by reason of the peculiar conditions which surround the operation of the pawnbrokerage business. It is our understanding that pawnbrokers operate in a dual capacity, that is to say, in addition to receiving pledges of tangible personal property upon which loans are made, it is customary to conduct retail mercantile operations in connection with the same business. It is our further understanding that the merchandise offered for sale at retail is acquired from two sources, namely, the forfeiture of such pledges as have been the subject of loans which remain unpaid beyond the contractual period, and wholesale purchases made in the normal channels of trade, such as are used by other mercantile establishments retailing similar types of merchandise.

With these peculiar features of the pawnbrokerage business kept in mind, we have further examined other provisions of House Bill No. 948 of the 63rd General Assembly. We find the term "taxpayer" defined in paragraph (b) of Section 2 thereof, in the following language:

"The term 'taxpayer' means any 'Credit Institution' subject to any tax imposed by this Act."

That pawnbrokers are included within the taxing provisions of the Act appears from the following quoted portion of paragraph (a) of Section 2, wherein we find the following language:

" * * * Without limiting the generality of the foregoing, the term 'credit institution' shall include persons, firms, partnerships, and corporations, operating or licensed under the 'small loan laws' of this state, or under the laws of this state relating to 'loan and investment companies', and pawn brokers, but shall not include banks, trust companies, credit unions, insurance companies, mutual savings and loan associations, building and loan associations, or real estate mortgage loan companies."

With this in mind, it seems to us that the incorporation of the terms "taxpayer" and "its" in those portions of the Act quoted supra, relating to the determination of net income, can refer only to such business operations as are included within the term "credit institution" as defined in the Act. So, reading the procedural provisions relating to the determination of net income, it becomes apparent that the Act seeks only to tax those business operations as are comprehended within the term "pawnbroker."

The term "pawnbroker" has not been the subject of a judicial definition by the appellate courts of Missouri. However, we do find the following definition thereof in 31 Words and Phrases, Perm. Ed., page 446:

"The word 'pawnbroker' has been variously defined as any person whose business or occupation is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise or any kind of personal property whatever, as security for payment of money loaned thereon. One who makes a busi-

ness of loaning money for interest and receives personal property in security for the payment of the same. * * * "

In addition, the sale of unredeemed pledges taken in by one who had ceased to operate as a pawnbroker has been held to amount to the conduct of a pawnbrokerage business, as appears from the further definition of the term in 31 Words and Phrases, Perm. Ed., page 446:

"A person who had formerly taken in goods upon pledge, but who had ceased to do so, still continuing to sell the unredeemed pledges, is a pawnbroker, and as such subject to the bankrupt laws. Rawlinson v. Pearson, 5 Barn. & Ald. 124."

That the Legislature had in mind that such sales constituted an integral part of the pawnbrokerage business appears from that portion of paragraph (b) of Section 5 of the Act, relating to gross income, which requires that there must be included therein "all gains or profits from the sale or other disposition of any property, real or personal, tangible or intangible."

That the tax imposed under House Bill No. 948 of the 63rd General Assembly is one exacted for the privilege of exercising the franchises of the various types of businesses mentioned therein appears from paragraph (a) of Section 3 of the Act, which reads as follows:

"Every credit institution as herein defined shall be subject to an annual tax for the privilege of exercising its franchise within the State of Missouri, according to and measured by its net income pursuant to the provision of this Act."

Since the tax is imposed upon the privilege of exercising the franchise of pawnbroker, it seems clear that the "net income" to be used in computing such tax must relate solely to that derived from the business which is subject to taxation under the Act. Applying this rule to the definition of "pawnbroker," quoted supra, it seems that only such net income as is derived from the operation of the business of pawnbroker should be used in computing the franchise tax imposed by the provisions of the Act. This would necessarily exclude from such computation the net income earned as a result of conducting the ordinary business of a retail merchant, even though such other business be conducted in connection with the pawn-

brokerage operations, but would include interest received for loans made, together with the profit realized upon the sale of unredeemed pledges.

In determining the profit realized upon unredeemed pledges, it would, of course, be necessary to allocate to such sales the proportionate part of the ordinary business expenses incurred in making such sales. These expenses would be properly deductible under the provisions of paragraph (c) of Section 5 of the Act, and would be in accordance with the bookkeeping methods to be employed by taxpayers whose income is derived from sources partly within and partly without the State of Missouri, with respect to which the Act provides in paragraph (d) of Section 5, in part, as follows:

" * * * Where income of taxpayer is derived partly from sources within the State of Missouri and partly from sources without the State of Missouri, gross income, deductions and net income shall be computed on the basis of a separate accounting method."

To construe the provisions of the Act otherwise would subject to double taxation that portion of the taxpayer's operations as is represented by his dealings as a merchant. His stock of merchandise acquired through ordinary wholesale business channels is subject to tax under the provisions of H.C.S. H.B. No. 536 of the 63rd General Assembly, relating to the taxation of merchants. Double taxation is not favored and is not to be presumed. See *Wood v. Dueser*, 164 S. W. (2d) 303.

CONCLUSION

In the premises, we are of the opinion that the tax imposed under House Bill No. 948 of the 63rd General Assembly for the privilege of exercising the franchise of a pawnbroker is to be computed by including in the gross income the interest received from loans, together with the gains derived from the sale of unredeemed pledges, less the ordinary business expenses incurred in the operation of such business, and that in the event such pawnbroker also engages in the business of a merchant, the proportionate part of such expenses should be allocated to the gross income derived from the sources mentioned, based upon the ratio existing between gross income from each source.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

WFB:HR

CIRCUIT COURTS:
FEES AND SALARIES:

Circuit Judge entitled to change of venue fee earned under Section 1074, R.S. Mo. 1939, but not paid to the circuit judge prior to the effective date of S.C.S.S.B. No. 442.

FILED

December 3, 1946

Honorable Dimmitt Hoffman
Judge 30th Judicial Circuit
Sedalia, Missouri

Dear Judge Hoffman:

This will acknowledge receipt of your recent request for an opinion, which reads:

"I should like an opinion from you relative to change of venue fees for Judges of the Circuit Courts.

"In this 30th Judicial Circuit the Clerk has in his possession a considerable number of fees sent to him as change of venue fees in certain civil cases. The cases for which the fees were sent him may be classed into four groups:

"Group 1; 24 cases filed December 6, 1944.

"Group 2; 15 cases filed July 12, 1946

"Group 3; 2 cases filed July 22, 1946.

"Group 4; 1 case filed Nov. 18, 1946.

"Three cases from Group No. 1 have been tried and appeals are pending in the Kansas City Court of Appeals. As I understand it the provisions of the present (New) Constitution became effective March 30, 1945. Also the provisions of the present salary law (Senate Bill 442) became effective October 6, 1946.

"I should appreciate your opinion as to just what fees of the above mentioned the Circuit Judge of the 30th Judicial Circuit is entitled."

We believe there can be no question as to the dates when the Constitution of Missouri of 1945 and Senate Committee Substitute for Senate Bill No. 442 became effective, and that

the dates mentioned in your request are apparently correct. The Constitutional Convention in submitting the proposed Constitution required the voters to pass on said proposal on Tuesday, February 27, 1945. (See last paragraph of Schedule, Constitution of 1945). Section 3(c), Article XII, Constitution of 1945, provides that the proposed Constitution submitted to the voters, if adopted, shall take effect thirty days after the election.

S.C.S.S.B. No. 442 was passed by both houses of the 63rd General Assembly prior to July 8, 1946, at which time the General Assembly recessed, and under a joint resolution adopted by said General Assembly prior to said recess conforming with Section 29, Article III, Constitution of 1945, said bill became effective ninety days after the date of recess, which date caused said bill to become effective on October 6, 1946.

S.C.S.S.B. No. 442, supra, requires the salary of circuit judges in circuits similar to the 30th Judicial Circuit to be paid by the state from the state treasury. Section 2 of said bill reads in part:

"* * * * and all other judges of the circuit courts of this State shall each receive an annual salary of \$6,000.00 payable by the State out of the State treasury."

Section 24, Article V, Constitution of 1945, provides that all judges shall receive as salary the present compensation until changed by law. Said section reads in part:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. * * * * *
The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

The salary of such circuit judges as yourself was not changed until S.C.S.S.B. No. 442 became effective on October 6, 1946. The courts in this state have uniformly held that a public officer is entitled to fees earned in his office, even though said fees are not collected until after the expiration of his term of office, provided such fees do not result in said officer's receiving a maximum salary in excess of that provided under the statutes and

Constitution of the State of Missouri. See Smith v. Pettis County, 136 S.W. (2d) 282; Lycett v. Wolff, 45 Mo. App. 489; and Corbin v. Adair County, 171 Mo. 385.

In Group 1 you mention the fact three cases in said group have been tried and are now pending on appeal, you do not indicate if the balance of cases in Group 1 and those in other groups have been tried. Section 1074, R.S. Mo. 1939, specifically provides that change of venue fee shall be paid to the judge trying the case after a trial had or upon final disposition of such cause in said court. In State v. Neal, 169 S.W. (2d) 686, 693, 350 Mo. 1002, the court, in holding the word "trial" includes all those steps in the trial during which the defendant may be of assistance to his counsel in conducting the proceedings, said: (l.c. 692)

"Section 1098, R.S. 1939, Mo. R.S.A. Sec. 1098, in our Civil Code defines a trial as 'the judicial examination of the issues between the parties, whether they be issues of law or of fact.' * * * * *

* * * * *

"* * * Thus State v. Braunschweig, 36 Mo. 397, 399, said: 'Trial is the examination of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land.' And State v. Brown, 63 Mo. 439, 444, used the exact definition found in the civil statute. * * * * *

In State v. Brady, 137 P. (2d) 806, 213, 156 Kan. 351, the court defined "trial" as follows:

"* * * Unless a different meaning is imparted by the context or indicated by the particular matter to which it relates the word 'trial' means--under broad definition generally recognized--the judicial examination and decision of matters at issue before a competent tribunal. 64 C.J. 32. * * * * *

In State ex rel. Conner v. Pritchard, 54 N.E. (2d) 283, l.c. 285, the court defined "trial" as follows:

"A trial includes all steps taken in a cause from the time it is submitted for trial until the rendition of final payment."

The courts in this state have held that the circuit courts have no longer jurisdiction after allowing an appeal. In *In Re Grading Bledsoe Hill v. Bledsoe*, 222 Mo. 604, l.c. 609, the court said:

"There is much force in this contention, for it is now the accepted doctrine in this State, under our general practice act, that after an appeal has been taken in the circuit court by the filing of the proper affidavit and an order allowing the appeal to the appellate court, the cause is regarded as pending in the appellate court, although the transcript has not been filed in the appellate court, and the circuit court has no authority to take any further steps in the cause save and except to perfect and correct its own records so as to make them speak the absolute truth of what transpired in said court. * * * * *

Also see *Goedecke v. Zurich General Accident & Liability Ins. Co.*, 7 S.W. (2d) 309, l.c. 311.

In view of the foregoing definitions of the word "trial" and decisions holding the circuit court has no jurisdiction of a cause after allowing an appeal, unquestionably you, as circuit judge, are entitled to change of venue fees in cases heard by you wherein judgments were rendered or said causes were disposed of prior to October 6, 1946, the date on which S.C.S.S.B. No. 442 became a law. Likewise, if any cause is in your court on a change of venue wherein an appeal has been taken, whether pending or disposed of, if said appeal was taken prior to October 6, 1946, then you are entitled to the change of venue fee.

CONCLUSION

Therefore, it is the opinion of this department that you are entitled to receive all change of venue fees on cases heard or disposed of by you prior to October 6, 1946. Specifically answering your request, you are entitled to a change of venue fee on all cases in groups 1, 2 and 3 wherein judgment was rendered or said cases were disposed of prior to October 6, 1946, regardless of whether appeals were taken in such cases. However, you are not entitled to a change of venue fee in the

Hon. Dimmitt Hoffman

-5-

one case filed in your court under group 4 for the reason
it was filed after the effective date of said bill, October
6, 1946.

Respectfully submitted,

AUBREY R. HAYMETH, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AED:LR

W. G. Smith
CIRCUIT COURTS:
FEES AND SALARIES:

Circuit Judge entitled to change of venue
fee earned under Section 1074, R.S. Mo.
1939, but not paid to the circuit judge
prior to the effective date of S.C.S.S.B.
No. 442.

December 3, 1946

FILED
41

Mr. John M. Holmes
Executive Secretary
Judicial Conference of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion. Restating your request, for the sake of brevity, you inquire if a case is tried or finally disposed of on a change of venue under Section 1074, R.S. Mo. 1939, and the change of venue fee has not been paid to the judge hearing the cause prior to the effective date of Senate Committee Substitute for Senate Bill No. 442, would said judge be entitled to said change of venue fee after the effective date of said bill.

From your request, we assume that at the time the cause was heard that Section 1074, R.S. Mo. 1939, was in effect and that S.C.S.S.B. No. 442 was not effective. Furthermore, that the matter was tried or disposed of prior to the effective date of said bill, but the Circuit Judge who heard said cause had not been paid the \$10.00 change of venue fee.

In *Smith v. Pettis County*, 136 S.W. (2d) 282, the court held that fees, although emoluments of the office, are allowed to and become the property of the judge himself. It is also well established that a public officer claiming compensation for official duties must point out the statute authorizing such payments, otherwise the performance of such services is deemed to be gratuitous. See *Nodaway County v. Kidder*, 129 S.W. (2d) 357, 344 Mo. 795.

This department recently held in an opinion that that part of Section 1074, R.S. Mo. 1939, allowing a circuit judge the \$10.00 change of venue fee was repealed by S.C.S.S.B. No. 442, passed by the 63rd General Assembly, which bill fixed the salary and expenses a circuit judge shall receive, and further provided that said salary and expenses shall constitute the total salary and expenses of said judge.

In *Givens v. Daviess County*, 107 Mo. 603, l.c. 610, the court, in holding that an officer was entitled to the salary provided by law at the time services were rendered for every day he held office, said:

"The salary to which plaintiff was entitled did not depend, in the least, upon the value of his services, but altogether upon what action the court took in the premises. Every day he held the office the law vested in him a right to a due proportion of the salary, as at that time fixed, and, consequently, an order changing the compensation could not have a retrospective operation and divest from him what was his already. Hence, when the order of December 6 was made, plaintiff had the undoubted right to demand and collect, as salary, at the rate of \$1,500 per year from the commencement of his term, January 24, 1885, to that date."

In the case of *Smith v. Pettis County*, 136 S.W. (2d) 282, Para. 15, the court in passing upon this question stated:

"* * * A probate judge may only collect fees for services which he has already performed. These services may be performed only while he is in office. His fees can accrue only while he is in office. These provisos only limit what he may keep. We said in *Corbin v. Adair County*, 171 Mo. 385, 71 S.W. 674, that a circuit clerk can demand and recover his uncollected fees from his successor. A suit for fees against a clerk's successor was upheld in *Lycett v. Wolff*, 45 Mo. App. 489."

Also, in the case of *Corbin v. Adair Co.*, 171 Mo. 385, l.c. 389, the court said:

"* * * To the amount of the difference between the fees collected by him which he had earned in 1898 and retained, and the amount earned and not collected for that year, not exceeding \$1,600, he can demand and recover the uncollected fees from his successor, and his own evidence shows they will be more than sufficient.
* * * * *

Also, in the case of Lycett v. Wolff, 45 Mo. App. 489, the court in passing upon the following statement of facts,

"This case is here on the defendant's appeal. The plaintiff was elected to the office of circuit clerk of St. Louis county, at the November election, 1878. He was inducted into office on the first day of January, 1879, and performed the duties pertaining to such position for the term of four years. In the petition it was alleged that the plaintiff, as such clerk, was entitled under the law to receive out of the fees earned by him during his term of office the sum of \$9,000, that is a yearly salary of \$2,250; that, during the time he held the office, he only received of the fees collected by him, on account of his salary, the sum of \$8,070, leaving a balance of \$930 due on his salary for the four years; that, at the expiration of his term, he had earned as clerk a large amount of fees which had not been collected; that the defendant was his successor in office, and had collected the sum of \$930 of the fees so earned, and had refused to pay them to the plaintiff."

said:

"* * * 'In Thornton v. Thomas, 65 Mo. 272, it was held that the fees of the office constituted a trust fund, to be applied in the payment of deputies and assistants, and the salary of the clerk fixed by law, and the surplus, if any, after such payments, to be paid into the treasury of the county. The question, as to whether one of these trusts would be to supply any deficiency in the receipts of a former year to cover expenses and salaries, was neither before the court nor decided in that case. If the annual fees earned by a clerk, as is held in the case above cited, are chargeable with a trust in favor of such clerk to the extent of his salary, and the compensation

allowed his deputies, it logically follows, that, whenever collected, they should be applied to the discharge of that trust."

The courts have held that a statute must be held to operate prospectively only, unless the intent is clearly expressed that it shall act retrospectively, or the language of the statute admits of no other construction. See *Lucas v. Murphy*, 156 S.W. (2d) 686.

Section 13, Article I, Constitution of 1945, is a prohibition against passing laws retrospective in their operation, and reads as follows:

"That no ex post facto law, nor law impairing the obligation of contracts; or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

CONCLUSION

Therefore, it is the opinion of this department that the change of venue fee hereinabove mentioned was earned by the circuit judge prior to the effective date of S.C.S.S.B. No. 442, and, at the time said fee was earned, Section 1074, R.S. Mo. 1939, was in full force and effect, and the mere fact that said fee had not been paid to the circuit judge at the time S.C.S.S.B. No. 442 became effective does not prevent the circuit judge from receiving said fee.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

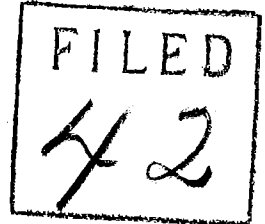
APPROVED:

J. E. TAYLOR
Attorney General

ARM:LR

BUILDING AND LOAN) Intent of Legislature to protect savings and
ASSOCIATIONS) loan associations from acts of omission is
) satisfied by provision of savings and loan
) blanket bond, Form 22, lines 92-93. Lines
) 101-102 of Form 22 not in conflict with Sec-
) tion 29 of House Bill 481.

April 4, 1946



H-12
Honorable F. M. Horton, Supervisor
Division of Savings and Loan Supervision
State Office Building
Jefferson City, Missouri

Dear Sir:

Receipt of your request for an opinion from this department is hereby acknowledged and reads as follows:

"Your opinion is requested as to whether Standard Form Number 22 Savings and Loan Blanket Bond, copy of which is submitted herewith, meets the requirements of Section #29 of the new Savings and Loan Law.

"Some doubt has arisen especially concerning lines 92 and 93, on the subject of 'omissions', and lines 101 and 102, excluding directors except when acting as employees."

Section 29 of House Bill 481, which bill establishes the new Savings and Loan Law referred to in your request, is as follows:

"All directors,--and officers, and all employees and agents of an association having control of or access to moneys or securities of an association,--shall before entering upon the performance of any of their duties furnish bond with adequate corporate surety, in amount and form to be approved by the board of directors and the supervisor, payable to the association as an indemnity for any pecuniary loss the association may sustain of money or other property

through any fraud, dishonesty, forgery or alteration, larceny, theft, embezzlement, robbery, burglary, hold-up, wrongful or unlawful abstraction, misapplication, misplacement, destruction or misappropriation, or any other dishonest or criminal act or omission by any such director, officer, employee or agent. In lieu of individual bonds, a blanket bond or bonds protecting the association from loss through any such act or acts on the part of any such director, officer, employee or agent may be furnished. The premiums on such bond or bonds shall be an expense of the association. Such bond shall provide that cancellation thereof by either the association or surety shall not become effective unless ten days written notice shall have been given to the supervisor,-- and if the association is an insured association, to the Federal Savings and Loan Insurance Corporation. All such bonds shall be filed with the supervisor, or some depository designated by him." (Underscoring ours.)

Lines 92 and 93 of the Savings and Loan Blanket Bond, Standard Form No. 22, are underscored in the following excerpt therefrom:

"Upon discovery of any loss under this bond a further premium, calculated pro rata upon the amount of such loss from the date of the giving by the Insured to the Underwriter of notice of such loss to the end of the premium year, shall be payable by the Insured to the Underwriter, and even though the further premium may not meanwhile have been actually paid, this bond shall be treated as reinstated so as to continue in force in the sum above stated in lines 4 and 5 as to loss or losses sustained while this bond is in force and discovered by the Insured prior to the expiration of twelve months after the termination of this bond, notwithstanding any previous

loss which the Underwriter may have paid or be liable to pay hereunder; provided, however, that the total liability of the Underwriter in respect of any loss or losses (a) caused by acts or omissions of any one person (whether one of the Employees or not) or acts or omissions in which such person is concerned or implicated, or (b) in respect of any one casualty or event, is limited to the sum above stated in lines 4 and 5 irrespective of the total amount of such loss or losses." (Underscoring ours.)

Section 29 of House Bill 481 anticipates that an association might suffer pecuniary loss through various methods, among which could be an omission of some duty on the part of a director, officer, employee, or agent. It is the intent of the Legislature that losses from such omissions be guarded against. Lines 92 and 93 are designed to cover that incident. We are of the notion that these lines are in accord with and satisfy the underscored portion of Section 29 of House Bill 481, supra, so as to give effect to such legislative intent.

The next step in your request includes lines 101 and 102 of the Savings and Loan Blanket Bond, Standard Form No. 22, which fall under the general heading of "But Warranted Free of all Claims" as follows:

"2. For any loss resulting directly or indirectly from the acts of any director of the Insured, except when performing acts coming within the scope of the usual duties of an Employee."

In connection with this last section it becomes necessary to determine just what the bonding company intends by the term "employee." Lines 26, 27, 28 and 29 of this bond form state:

"1. By reason of any dishonest, fraudulent or criminal act of any officer or employee of the Insured, or of any duly elected or appointed attorneys of the Insured (such officers, employees and attorneys being hereinafter called

Employees), including loss of Property by reason of any such act of any such Employee, whether acting independently or in collusion or combination with any other person or persons." (Underscoring ours.)

Although the word "director" does not appear among those who are to be called employees, we believe it to be included in the word "officer." A director is defined in this state in the case of State v. Bode, 113 S. W. (2d) 805, 1. c. 808, wherein it is held:

"* * * Furthermore, the word 'director' is defined as follows:

"'One who, or that which directs,'
18 C. J. 1046.

"'One who directs; one who regulates, guides or orders; a manager or superintendent.' Webster's New International Dictionary.

"One who, or that which directs; exp., a chief administrative official.' 1 New Century Dictionary."

We are therefore of the notion that directors are included in the term "officers" for the purposes of this bond form and as such are classified as employees thereunder. This being so, we do not believe lines 101 and 102 to be in conflict with the intent of Section 29 of House Bill 481, supra.

Conclusion

It is, therefore, the opinion of this department that lines 92 and 93 are competent to satisfy Section 29 of House Bill 481 on the subject of pecuniary losses arising due to an omission of duty on the part of a director, officer, employee or agent.

It is further the opinion of this department that under Savings and Loan Blanket Bond, Standard Form No. 22,

Honorable F. M. Horton, Supervisor - 5

directors are included in the term "officers" and as such are to be classified as employees for the purposes of the bond. Therefore, lines 101 and 102 are not in conflict with Section 29 of House Bill 481.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

SAVINGS AND LOAN SUPERVISION: Holder of Installment Shares retired by directors of association entitled to receive full value thereof and earnings to date of retirement.

August 26, 1946

FILED

42

Honorable F. M. Horton, Supervisor
Division of Savings and Loan Supervision
State Office Building
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an opinion which reads as follows:

"As Supervisor of the Division of Savings and Loan Supervision of Missouri, I desire an opinion on a question now before me for determination.

"The Board of Directors of the St. Charles Building and Loan Association of St. Charles, Missouri, as of September 30, 1944, called for retirement all outstanding Free Installment shares, giving the holders thereof a choice of cash, or Optional shares, in lieu thereof.

"Retirement value was computed on the basis of Withdrawal Value as of June 30, 1944, with no earnings being allowed from that date to September 30, 1944. However earnings were paid and credited to all other shares for that period.

"Withdrawal Value,' as applicable to shares in Building, Savings, and Loan associations, is the amount payable to the shareholder should he voluntarily withdraw from the association prior to the maturity of the shares. This value is the actual, or book value, less a portion of the earnings allocated as a penalty for not completing the contract to purchase the shares.

"The power of the board to retire the shares is not questioned, as such power is clearly granted under Section 3223, Revised Statutes of 1939, this section also setting out the basis on which shares shall be retired. Reading in part as follows:

"'---and provided further, that the matured shareholders shall be entitled to receive and shall be paid the full value of their shares at the time,---'

"The shares in question were retired by order of the Board of Directors, and at a value less than the full value, with no earnings allowed for the period June 30, 1944 to September 30, 1944.

"It would appear this was an involuntary withdrawal on the part of the shareholder and should have received the full value of the shares plus earnings to the date of retirement.

"While the earnings for the period June 30 to September 30 is not specifically covered by the above section of the Statutes, Section 32 of the By-Laws of the association reads as follows:

"SECTION 32. MONTHLY INSTALLMENT SHARES. WITHDRAWALS.

"Monthly Installment Shares may be withdrawn by the shareholder at any time, upon giving thirty days' notice in writing of such intention to withdraw, subject, however, to the limitations of Section 36 of these By-Laws, and when so withdrawn the shareholder shall be entitled to receive the Dues paid on such shares plus the dividends which may have been irrevocably credited on such shares prior to the date of such

withdrawal, provided, however, that if such Monthly Installment Shares shall be withdrawn within one year from the date of the issuance thereof, a discount of five per cent. of the dues paid on such shares shall be deducted from the amount which such withdrawing shareholder shall be entitled to receive.

"After the expiration of two years from the date of the issuance thereof dividends shall be irrevocably credited on Monthly Installment Shares at such rate as may be determined by the Board of Directors, such dividends, however, prior to the expiration of six years from the date of the issuance of such shares shall not exceed five per cent. per annum.

"Monthly Installment shares may, by order of the Board of Directors, be called in for cancellation at any time after the expiration of three years from the date of the issuance thereof, regardless of whether or not the member owning such shares has filed an application for their withdrawal and, when so called in for cancellation, shall be redeemed at the amount of Dues paid on account of such shares plus the dividends accrued thereon to the designated date of cancellation.

"Fines due by withdrawing members shall in all cases be deducted from the amount which such withdrawing member shall be entitled to receive under the provisions of this section. Fines already paid shall not be refunded."

"The Board of Directors have taken the position that the shareholders accepted either an Optional share account, or cash, for their Installment shares, and that such acceptance by them made the

August 26, 1946

transaction a voluntary withdrawal by the shareholder.

"The Department has held that this action, having been initiated by the Board of Directors, was retirement of shares by them, and that they were not justified in computing the values on the Withdrawal basis. Also, in view of provision in Section 32 of the association By-Laws providing that earnings shall be allowed to the designated date of cancellation, it would appear earnings should have been allowed to September 30, 1944.

"A copy of letter sent to the shareholders advising them of the action by the Board is attached for your information.

"Will you kindly advise me if, in your opinion, I am correct in assuming these shares should have been retired at their full value, including earnings to the date of retirement."

From the contents of your letter it is an inescapable conclusion that the Free Installment shares were not voluntarily withdrawn. The Withdrawal Value, therefore, is not the proper basis for computing the retirement value of these shares.

You refer to Section 8223, R.S. No. 1939, and we note that that section has been amended in part and reenacted in the Laws of 1943, at page 334, Section 4, wherein it is provided:

"Each shareholder shall pay to said corporation at or before each stated meeting of the directors or at such time as may be provided in the by-laws, as a contribution to the capital thereof, the sum fixed as dues for each and every share held by him. The board of directors of each association shall make semi-annually such appropriations for reserves as may be required by law or deemed advisable and then shall make in its discretion apportionment of net earnings to outstanding shares in the ratio the book value of each share bears to the total book value of all shares, except shares pledged in connection with real

estate loans which are outstanding on the effective date of this act, and which shares so pledged may be credited with dividends at a rate greater than the rate at which dividends are credited to other shares. All earnings so apportioned or distributed, but not paid in cash, shall be added to the individual share accounts, becoming a part of the book value and capital account and so appearing on the records of the association. And all amounts carried by any association upon its books, upon the effective date of this act, which actually represent earnings apportionable for a previous semi-annual period or periods to a particular share or class of share accounts but which have not been credited thereto, shall be apportioned and credited before the expiration of the current semi-annual period; provided, however that any association which, at the effective date of this Act, has outstanding monthly installment shares may continue allocating from net earnings, after required reserve appropriations, dividends to such installment shares at a rate greater than the rate at which it allocates dividends to other classes of shares until such outstanding installment shares are fully paid. Whenever an unpledged share shall reach its maturity, all payments thereon shall cease and the holder of such stock may withdraw the same as provided in this law. If not so withdrawn, such matured stock shall be and become fully paid stock of the association in a sum equal to the matured value of said shares: PROVIDED, HOWEVER, that at no time shall more than one-half of the funds in the treasury be applicable to the payment of such matured shares without the consent of the directors; AND PROVIDED further, that the directors of said corporation may, at their discretion, under rules made by them, retire the unpledged full paid shares, or prepaid shares, at any time, and may in like manner retire installment shares at any time after the expiration of three years from the date of the issue thereof by enforcing the withdrawal of the

August 26, 1946

same; AND PROVIDED further, that the matured shareholders shall be entitled to receive and shall be paid the full value of their shares at the time, less all fines and their proportionate part of any loss. The particular shares to be so involuntarily retired shall be determined under such regulations as the directors may prescribe. Borrowing shareholders, for each share borrowed upon, shall, in addition to the dues aforesaid, pay the stated periodical payment of interest, and in associations in which the premium is paid by installments, the periodical payment of premium agreed upon until such shares shall reach the ultimate value thereof, when said shares and said loan shall be declared cancelled and satisfied. And association may, in its by-laws, provide that the holders of free or unborrowed shares shall not receive any more than the face value of their shares less the average premium paid by the borrowers of the association up to date; AND PROVIDED further, that when any shares of stock of an association have, in the opinion of the board of directors, reached their ultimate value, such fact shall be reported to the supervisor of building and loan associations; and no stock shall be matured or money paid thereon except with the consent and approval of said supervisor of building and loan associations. An association may by agreement with a shareholder pay the value of matured shares to the shareholder in agreed monthly installments; and where there is such agreement the association shall not be required to make any other payments in the repurchase of such matured shares, notwithstanding any other provision of this chapter." (Underscoring ours.)

We have underscored that part included by your correspondence plus a statement which applies to the present situation and provides that, if the directors at their discretion retire installment shares, they do so by enforcing the withdrawal of such shares, which is sufficient to show the involuntary nature of the retirement. Having been so retired, the matured shareholders are then entitled to receive and be paid the full value of their shares at the time of their retirement. Their retirement was called for as of September 30, 1944, and the holders of these retired shares

August 26, 1946

are entitled to their part of the earnings to that date.

We note the third paragraph of Section 32 of the By-Laws concerning Monthly Installment Shares and Withdrawals is a rewording of the underscored portion of Section 8223, supra, and it is under this section and paragraph that the retirement was undertaken.

CONCLUSION

It is, therefore, the opinion of this department that, when the directors of a building (savings) and loan association call for the retirement of outstanding Installment Shares, they are to be retired at their full value, plus earnings to the date of retirement.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:LR

INDIGENT INSANE:
COUNTY COURT:
PROBATE COURT:

Under S. B. No. 284 the probate court is the only court
which has the power to commit indigent insane.

July 31, 1946

FILED

43

8/3
Honorable George H. Hubbell
Judge and ex-officio clerk
Probate Court, Grundy County
Trenton, Missouri

Dear Sir:

We received your letter of recent date which
submitted to this department the following question for
answer. We quote:

"Has the Probate Court the constitutional
authority and jurisdiction, under Article
V of the Constitution, 1945, to commit
indigent insane persons to a state hospital
for the insane?"

A brief analysis of the Probate Court and the
County Court will be necessary and pertinent to a solution of
the problem presented by your question.

We will not undertake to examine the historical back-
ground of the two courts for the reason that we believe that,
while such history is interesting from a scholarly standpoint,
it has no particular bearing upon the present problem.

The Probate Court was first recognized as a constitu-
tionally created court by the constitution of 1875, therein the
framers of the constitution provided Section 34, Article VI,
which was subsequently approved by the sovereign power. This
section provided for the jurisdiction and powers of the Probate
Court at that time and under the constitution of 1875. Said
section reads as follows:

"Probate courts, jurisdiction and powers.--
The General Assembly shall establish in
every county a probate court, which shall
be a court of record, and consist of one
judge, who shall be elected. Said court

shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians; and the sale or leasing of lands by administrators, curators and guardians; and also jurisdiction over all matters relating to apprentices: Provided, That until the General Assembly shall provide by law for a uniform system of probate courts, the jurisdiction of probate courts heretofore established shall remain as now provided by law."

After analyzing your question under the constitutional provision quoted supra, and the statutes in existence and in effect prior to the adoption of the 1945 constitution, we find the courts holding directly that the county court was the only court that possessed the power to commit indigent insane to state hospitals or proper asylums. In *Ussery v. Haynes*, 344 Mo. 530, 127 S. W. 2d, 410, the Supreme Court, at l. c. 417, made the following statement:

"In the matter of examining into and determining the question whether plaintiff should be committed to the hospital the county court had jurisdiction of the subject matter. The statute gave it jurisdiction of that class of cases. * * * "

Obviously, the Supreme Court of Missouri acknowledged the power of the county court to commit indigent insane as an exclusive power by reason of Section 9328, R. S. Mo. 1939, then in effect, which vested in the county court this power to commit. Other and later cases acknowledging that the county court alone had the power to commit indigent insane by reason of the statute are: *Van Loo v. Osage County*, 346 Mo. 358, 141 S. W. 2d 805; *Downey v. Schrader*, 182 S. W. 2d 320, 353 Mo. 40; *State ex rel. Moser v. Montgomery*, 186 S. W. 2d 553, l. c. 554. There is no question but that up to this time only the county courts could commit the indigent insane and the probate courts were denied jurisdiction over the subject matter of committing indigent insane. The Constitution of Missouri, 1945, contains Section 16,

Article V, which now defines and limits the jurisdiction of the probate courts in this state. Said section reads as follows:

"Probate Courts--Jurisdiction.--There shall be a probate court in each county with jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this Constitution."

Under the two sections of the constitution, that section from the constitution of 1875 and that section of the constitution from 1945, we see that there is no direct prohibition against the probate courts acting over the subject matter of committing indigent insane, nor do either of the constitutional sections contain a direction to the probate court that said court act over the subject matter of committing indigent insane. That is the present status of the probate court in relation to this matter. In other words, there was no constitutional or statutory authority, up until July 1, 1946, which prohibited or directed probate courts concerning the subject matter of committing indigent insane.

Let us return to the county courts and examine their course in this matter. The county courts, as pointed out in the cases supra, were recognized under the constitution of 1875 and Section 9328, R. S. Mo. 1939, in effect up until July 1, 1946, as the only court with power to commit indigent insane. As pointed out in the cases supra, this power of the county court to commit indigent insane came into being by reason of Section 9328, R. S. Mo. 1939, which provided in part as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * * * *

The constitutionality of this power of the county court to commit indigent insane has been tested in the Van Loo case, cited supra. The court held that these statutes empowering the county court to commit indigent insane were valid statutes because they were enacted in furtherance of the constitutional provisions which allowed the county court to transact all county business. Sec. 36, Article VI, Constitution of 1875, provides:

"County courts.--In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

As the county court, upon the committing of an indigent insane, would subject the county revenue to this burden, this constituted county business and was a power exercised by the county court by its jurisdiction over this matter, by reason of the constitution and statute, supra.

There is no constitutional provision in either the constitution of 1875, or the constitution of 1945, which directs or prohibits the county court in taking jurisdiction of the committing of indigent insane.

Therefore, we see by our analysis that the county court, until July 1, 1946, was the only court that had the power to commit indigent insane and that power came into being through the legislative enactment of Section 9328, R. S. Mo. 1939.

Our problem now is, what is the status of these two courts, the probate court and the county court, as to the power to commit indigent insane under the statutes now in effect and the constitutional provisions now in effect. The legislature, under Senate Bill No. 284, has placed the power of committing indigent insane within the jurisdiction of the probate courts. Senate Bill No. 284 repealed all sections of the Missouri Statutes which dealt with the power to commit indigent insane in county courts, and placed this power in the probate courts. We must now examine the law to see whether or not this transfer of the power to commit indigent insane from the county courts to the probate courts, by reason of Senate Bill No. 284, is an effective transfer of power.

Keeping in mind the constitutional provisions quoted supra,

and what they provide, we come to the general principles of constitutional law to find the extent the legislature may go in enacting laws under constitutional provisions. The general rule of constitutional law, in regard to what laws the legislature may pass, is that the legislature possesses all legislative powers not prohibited by the constitution, either expressly or by necessary implication: State ex rel. Crutcher v. Koeln, 61 S. W. 2d 750, 352 Mo. 1229. A similar statement of the rule is found in State ex rel. Gaines v. Canada, 113 S. W. 2d 783, 342 Mo. 121, where the court held that the Missouri Constitution is a limitation on, and not a grant, of legislative power and, therefore, the legislature can enact any law not expressly or impliedly prohibited by the federal or Missouri Constitution. In other words, all legislative authority not denied the General Assembly by the constitution resides in the General Assembly. Further, the legislature needs no specific constitutional authorization for its enactment, only such enactments must not contravene any prohibition of the federal or state constitutions which are either expressed or impliedly contained therein. In other words, the legislature may pass any law not prohibited by the constitution, and the constitution need not affirmatively command the law in order that it be valid. It is only necessary that the constitution does not prohibit the legislature's act.

With that general rule of constitutional law in mind, we turn again to the Downey case cited supra and, at l. c. 323, we find the following statement of the Supreme Court of Missouri:

"* * * "The general authorities show such lunacy inquisitions are governed by statute, 28 Am. Jur. Sec. 10, p. 661; and that historically the power was derived from the Kings of England, thence passed to the chancellor, and in this country to the people who have left it with the Legislature. 32 C. J. Sec. 162, 165, pp. 626, 628. The Legislature has implemented the power through the county court and probate court statutes mentioned in the beginning. * * * "

Summarizing the above discussion, we find that there is no direct prohibition, nor any implied prohibition in the constitutional provisions relating to the probate court or to the county court which would be contravened by the placing of the power to commit indigent insane within the jurisdiction of probate courts. As the constitutional provisions show, the probate courts have the power to appoint guardians and curators of insane persons, not

only as to their property, but, under the Redmond case, 225 Mo. 721, 126 S. W. 159, also, the probate court may appoint guardians as to the person. Further, under the statutes the probate court has the power to hold insanity hearings, Section 447, R. S. Mo. 1939. The power to appoint guardians by the probate court is found in the Laws of 1941, page 237, Section 451. The probate court may summarily restrain the dangerously insane, Section 497, R. S. Mo. 1939. In fact all of Article XVIII, Chapter 1, R. S. Mo. 1939, provides for the different powers of the probate court in dealing with insane persons, both as to their estate and their person. Why should the final power to commit indigent insane be denied the probate court? We see no reason for constitutionally denying the probate court this power.

Lacking as we do any direct or implied prohibition of the probate courts to commit indigent insane, we can see no reason why - - in view of all their statutory powers in regard to insane, whether indigent or not - - the legislature may not grant to the probate court the power to commit an indigent insane person. We see by the last quotation from the Downey case, cited supra, that the power to deal with the insane was left with the legislature. The legislature, in the exercise of that power to deal with insane persons, placed the power to commit within the jurisdiction of the probate court, by reason of Senate Bill No. 284. Said bill provides, page 3, Section 9328:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. * * * * *

CONCLUSION

In our opinion Senate Bill No. 284 is a valid and constitutional law, granting to the probate courts the power to commit indigent insane, for the reasons set out in the discussion above.

Respectfully submitted,

APPROVED:

WILLIAM C. BLAIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

WCB:m:DA

TO: NSHIP: Not authorized to appropriate township funds to make deposit in county treasury of sum fixed by county court as probable amount of damages to landowners in a proceeding on petition of 12 freeholders of township to establish road ordered established at cost of petitioners.

January 10, 1946



1-16

Honorable David E. Impey
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

Receipt of your request for an opinion from this department is hereby acknowledged, which reads as follows:

"I request the opinion of the Attorney General whether the trustees of a township in a county under township organization may appropriate township funds to make the deposit in the county treasury of the sum fixed by the County court as the probable amount of damages to land owners in a proceeding on the petition of at least twelve freeholders of the township to establish a public road ordered established at the cost of the petitioners."

The situation referred to in your letter is covered by Section 8475, R. S. Mo. 1939, which provides:

"When the petition required by section 8474 of this article is presented, upon proof of this notice having been given as required by section 8474, and if no remonstrance, as herein mentioned, is presented, and if the petitioners give the right of way for said proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by landowners through whose land said proposed road would run, the court must, without discretion to do otherwise, open said

road and the court shall thereupon proceed as in this section hereinafter provided in cases where upon a hearing the court finds it necessary to establish a road; and if a remonstrance be, presented, signed by twelve or more freeholders residing in the municipal township or townships through which it is proposed to establish said road, three of whom shall reside in the immediate neighborhood, the court shall hear such witness as the respective parties may produce in regard to the public necessity, practicability and probable damages, if any claimed, to the owner of the land through which it is proposed to establish said road, and the expense of establishing and building same, including bridges and culverts therein; and if the court, upon the hearing, shall find the facts in the case do not justify the establishing of the road at the expense of the county or of the petitioners, the proceedings shall be dismissed; but if the court upon said hearing shall find the facts do justify the establishing of said road, either at the expense of the county or of the petitioners, or both, it shall make an order accordingly. If the court finds it necessary to establish said road at the expense of the county, or if it be found necessary to establish same either wholly or partly at the expense of the petitioners and said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands, then, in either event, the court shall make an order directing the county highway engineer, within sixty days thereafter, to view, mark out and survey such road, take all relinquishments of the right of way of those who will give the same, and take the names of all owners of land, through which said road may run, and who have not given or will not give the right of way,

and the amount of damages claimed by each one separately, together with a description by section and subdivision thereof of the lands of each owner sought to be taken, and also the engineer's estimate of the cost of bridges, culverts and grading that may be necessary upon such road, and shall report his proceeding in the premises, together with his survey and plat of said road, to the court within the time last above provided. If it shall appear from said report that the right of way has been secured, and deeds therefor filed, or that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners as aforesaid, or both, the court shall order the road established. All relinquishments, deeds and plats of said roads shall be by the highway engineer filed in the office of the county clerk and shall be preserved as public records, and all such deeds shall be filed and recorded in the office of the recorder of deeds." (Underscoring ours.)

Upon a thorough reading of this section we can find no provision whereby the trustees of a township are authorized to pay into the county treasury a sum of money estimated as a probable amount of damages to landowners in such a proceeding as is presented by your writing. The section provides rather that the "said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands," which provision is exclusive and falls under the well known rule that "the expression of one thing is the exclusion of another," which rule is found most recently in Missouri in the case of State v. Smith, 111 S. W. (2d) 513, 1. c. 514.

A township board cannot undertake to do that which it is not authorized to do by law. The recent case of Jensen v. Wilson Township, Gentry County, 145 S. W. (2d) 372, 1. c. 374, holds:

"* * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority.

Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S. W. 794. * * *

We can find no constitutional or statutory authority under which a township board may appropriate township funds for the purpose described in your request.

Conclusion

It is, therefore, the opinion of this department that in a proceeding on the petition of at least twelve freeholders of a township to establish a public road ordered established at the cost of the petitioners, the sum fixed by the county court as the probable amount of damages to the landowners should be deposited by said petitioners.

It is our further opinion that the trustees of the township in a county under township organization may not appropriate township funds in the proceeding aforementioned.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

7
FACTORIES: Sec. 10175, R. S. Mo. 1939, does not apply to employees of an electrical construction company making rural electrical installations.

July 22, 1946



Mr. Lon N. Irwin, Director
Division of Industrial Inspection
Department of Labor and Industrial Relations
State Office Building
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of July 17, 1946, requesting an official opinion of this office, and reading as follows:

"The Associated Industries of Missouri is asking for an interpretation of Section 10175 of the Missouri Statutes referring to the employees of the operators of all manufactories, including plate glass manufactories operated in this state.

"I wish you would give us an opinion of this so that we may inform the Associated Industries of Missouri."

The letter received by you from the Associated Industries of Missouri under date of July 10, 1946, which you enclosed, reads as follows:

"Section 10175 of the Missouri Statutes refers to 'employees of the operators of all manufactories, including plate glass manufactories operated within this state.....' We would like an official interpretation of whether this Section is construed to apply to employees of an electrical construction company making rural electrical installations. Their work, of course, does not include manufacturing of any products.

"Should the employees of such a company be construed to be covered by this Section of the

Statutes, we would like an interpretation of whether or not employees of service and other types of non-manufacturing organizations are likewise considered to be covered. We have in mind particularly such organizations as public service companies, public utilities, building construction companies, warehousing establishments, retail and wholesale establishments and automobile repair shops."

Section 10175, R. S. Mo. 1939, to which you refer, reads as follows:

"The employees or the operators of all manufacturing, including plate-glass manufacturing, operated within this state shall be regularly paid in full of all wages due them at least once in every fifteen days, in lawful money, and at no pay day shall there be withheld from the earnings of any employee any sum to exceed the amount due him for his labor for five days next preceding any such pay day. Any such operator who fails and refuses to pay his employees, their agents, assigns or anyone duly authorized to collect such wages, as in this section provided, shall become immediately liable to any such employee, his agents or assigns for an amount double the sum due such employee at the time of such failure to pay the wages due, to be recovered by civil action in any court of competent jurisdiction within this state, and no employee, within the meaning of this section, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions hereof."

"Manufactory" is defined as:

"A building, the main or principal design or use of which is to be a place for producing articles as products of labor; not merely a place where something may be made by hand or machinery, but what in common understanding is known as a 'factory.'" Black's Law Dictionary, page 1156.

"A place where something is manufactured; a factory." Webster's International Dictionary, Second Edition.

"Factory" is defined as:

"A building, or collection of buildings, usually with its equipment or plant, appropriated to the manufacture of goods; the place where workmen are employed in fabricating goods, wares or utensils." Webster's International Dictionary, Second Edition.

In Section 10244, R. S. Mo. 1939, it is provided:

" * * * The expression 'factory' means any premises where steam, water or other mechanical power is used in aid of any manufacturing process there carried on. * * *"

Article 8, Chapter 68, R. S. Mo. 1939, of which Section 10244 is a part, is entitled "Sanitation and ventilation when three or more persons are employed."

It is clear from the definitions above that Section 10175, R. S. Mo. 1939, does not apply to employees of an electrical construction company making rural electrical installations.

The expression of one thing is the exclusion of another in the construction of statutes. *Keane v. Strodtman*, 87 S. W. (2d) 195, 323 Mo. 161.

The question of whether or not such organizations as public service companies, public utilities, building construction companies, warehousing establishments, retail and wholesale establishments and automobile repair shops are to be included under Section 10175 depends on a matter of fact, that is, whether or not, under the definitions above quoted, the particular organization is conducting business as a manufactory. In any case, where a factory is not operated, Section 10175 does not apply.

In regard to the time of payment of wages, your attention is invited to Sections 5080 and 5081, R. S. Mo. 1939.

Mr. Lon N. Irwin - 4

CONCLUSION

1. Section 10175, R. S. Mo. 1939, does not apply to employees of an electrical construction company making rural electrical installations.

2. Employers who do not operate a manufactory, as defined in this opinion, or their employees, are not affected by the provisions of Section 10175, R. S. Mo. 1939.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CORPORATIONS: IN RE: The District No. 2, Missouri State Nurses'
LICENSES: Association is not a charitable organization
Nurses Assn. and is subject to licensing under Sections
10161 to 10164, R. S. Mo. 1939.

September 11, 1946



Mr. Lon N. Irwin, Commissioner
Department of Labor and Industrial
Inspection
Jefferson City, Missouri

Dear Mr. Irwin:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department on the following question: Should the District No. 2 State Nurses' Association be required to comply with the license requirements of Section 10161, R. S. Mo. 1939?

Section 10161 is in Article 2, Chapter 68 of the Revised Statutes of 1939, and reads, in part, as follows:

"Sec. 10161. Employment offices or agencies to obtain licenses--license fees, etc.

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. * * *"

Section 10164, R. S. Mo. 1939, reads as follows:

"Free employment bureaus exempt

"The free public employment bureaus organized and established, or to be organized and established in this state by the commissioner of labor and industrial inspection, or charitable organizations, shall not be subject to the provisions of the three preceding sections."

Under the broad wording of Section 10161, supra, we think there

is no question but that the Nurses' Association would be subject to the provisions of that section unless it is a charitable organization and, therefore, exempt under Section 10164, supra. The legal issue to be determined is, therefore, whether the District No. 2 Missouri State Nurses' Association is a "charitable" organization.

In a very recent decision of the Supreme Court of Missouri in the case of the Evangelical Lutheran Synod of Missouri vs. Hoehn handed down on August 1, 1946, wherein the nature of a charitable organization was discussed, the court speaking through Ellison, J., stated that whether an association is charitable is to be determined by the articles of association and by what the association's activities under its charter have been. The court further said that the primary objective in any search to determine the nature of such institution should be a determination of the main purpose of the association considering it is a single unit. This case has not been reported as yet, therefore, it is impossible to give any citation.

With these cardinal rules for the determination of the nature of a charitable institution before us, we proceed to an examination of the facts with regard to the Nurses' Association. The petition for a pro forma decree of incorporation in the Circuit Court of Jackson County, Missouri, September Term, 1911, stated the purposes of the organization to be the following.

"(a) To maintain the highest standard of the nursing profession.

"(b) To maintain a code of ethics.

"(c) To be and constitute a nurses' club for the promotion of friendship and fellowship among nurses and for such benefits as may be derived from organized help and encouragement of any kind whatever, whenever needed among the members.

"(d) To found and maintain, out of the dues of the membership, a central directory of nurses for the convenience of physicians and the public generally, in readily locating a nurse whenever one is needed.

"(e) To found and sustain a library for the benefit of the members.

"(f) To engage in any other activity appertaining to any of the objects and purposes above enumerated, or to promote any undertaking, within the provisions of Article X, Chapter 33, Revised

Statutes, 1909, that may have for its object the promotion or betterment of service to the public generally to the end that the sick and afflicted may best be cared for and their welfare best preserved."

In examining the above, it will be noted that the only purpose which the charter states is solely for the benefit and convenience of persons, other than members of the Association, is paragraph (d). The entire unit purpose of the Association is to maintain cooperation, standards and promote the welfare of registered nurses. Even if purpose (d) were to be considered as indicating the charitable nature of the directory, we would have to disregard that fact here since the directory in question is, by the admission of the Association, not maintained out of the "dues of the membership" of the Association, but those nurses on the directory must pay a fee of \$16.00 in order to be placed upon the directory and must, in addition, pay a certain portion of their salary when employment is found for them. The present registry is, therefore, not being conducted in accordance with the charter provisions.

The activities of the Association have very substantially followed their charter rights in so far as we have been able to determine from the attached correspondence. We take it from said correspondence that the only deviation has been the failure to maintain the registry solely out of the dues of the membership of the Association.

We think, therefore, that the charter of the Association does not grant to the Association powers and rights which would result in placing it within the category of charitable associations. Since, with but one exception, as far as we have been able to determine, the activities of the Association have followed their charter powers and since this one exception falls toward the non-charitable rather than the charitable side of the scales, we think the activities of the Association cannot be said to be of a charitable nature.

In *Salvation Army v. Hoehn*, (1945) 188 S. W.(2d) 326, the Supreme Court of Missouri, in discussing the charitable nature of the Salvation Army, quoted with approval the following definition of a charity:

"Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence

of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. * * *"

Thus, a charity is a gift. We think there is nothing in the nature of a gift resulting from the operation of the nurses' registry. We fully realize the benefit to the physicians and to the public which is undoubtedly inherent in the operation of the same, but with all due respect and admiration for the nurses' profession, and for the purpose of the Association, we think that the primary purpose of the registry is to obtain employment for the members of said registry. To state it another way, we think the registry is not in the nature of a gift for the benefit of any group of the public but is for the purpose of better promoting the welfare of the registered nurses of the District No. 2, Missouri State Nurses' Association.

In writing this opinion we are not unmindful of *Salvation Army v. Hoehn supra*, *Eads v. Y. W. C. A.*, 29 S. W. (2d) 701, 325 Mo. 577, and other similar cases in which the court has held that such associations and organizations were not subject to property taxes because they were charitable in nature. These cases can be distinguished in that the organizations involved were all organized for the purpose of reaching out and aiding some part or all of the public. This purpose is found stated in the charters and is apparent in the activities of said organizations. As we pointed out above, we think this cannot be said of the District No. 2, Missouri State Nurses' Association, although there is undoubtedly an incidental benefit to physicians and the public through the operation of the Central Nurses' Registry.

CONCLUSION

It is, therefore, the opinion of this department that the District No. 2, Missouri State Nurses' Association is subject to the provisions of Article II, Chapter 68, Sections 10161 to 10165, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General
SNC:mw

HOTEL
BOARD OF HEALTH:

Y.M.C.A. of St. Louis required to pay hotel
license fees.

FILED

45

May 6, 1946

378

R. M. James, M. D.
State Health Commissioner
Jefferson City, Missouri

Attention: Mr. Warren E. Lofton, Supervisor
Division of Food & Drugs

Dear Sir:

We are in receipt of your request for our official
opinion in which you present the following questions:

May the Young Men's Christian Association
of St. Louis and St. Louis County be con-
sidered a hotel, within the meaning of Sec-
tion 9931, R. S. Mo. 1939?

If its buildings may be considered hotels,
is the Young Men's Christian Association
exempt from the payment of the license fees
provided by the State Hotel Inspection Law?

Attached to your letter is correspondence from the Busi-
ness Secretary of the Young Men's Christian Association in
St. Louis, stating that while the organization has no objec-
tion to the payment of the required fee, or the inspections
made thereunder, yet there was an objection to the designa-
tion of their buildings as hotels, as defined in the Hotel
Inspection Law. The correspondence also states, "our room
and dormitory facilities, which are available on a membership
basis and in some instances to poverty-stricken or otherwise
under-privileged persons, are provided and function purely as
an incident to the religious, charitable and educational pur-
poses of the Y.M.C.A."

These facts, together with those which will be pointed
out later as appearing in cases previously determined by the

Supreme Court of Missouri, form the basis for determination of whether such activities come within the Hotel Inspection Act, Article 6, Chapter 58, R. S. Mo. 1939.

Section 9931 of said article provides:

"That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner." (Emphasis ours.)

In State ex rel. St. Louis Young Men's Christian Ass'n. v. Gehner, 11 S. W. (2d) 30, which was a proceeding to quash certain assessments against real estate in St. Louis owned by the St. Louis Young Men's Christian Association, an agreed statement of facts discloses the extent of the use of the Y.M.C.A. buildings by both members and nonmembers of the association. From these facts it appears that there are several hundred rooms in such use. In consideration of the question before it, the court stated, l. c. 37-38:

"The by-laws of relator provide that full membership in the association is required before one may rent a room. Yet the record discloses that this by-law has been ignored, for relator has rented its rooms to men from other cities, other states, and other countries, who may well be termed transients in St. Louis, some of whom paid, but others showed no disposition whatever to pay. * * * True, some of the occupants of the rooms claimed they were unable to pay, and did not pay, and doubtless never will pay, yet there was an obligation to pay, and relator accepted of pay when offered by these parties, some of whom were nonresidents of the state. Relator in each

building has helped many persons, many of them worthy; but such commendable acts do not authorize us to attempt to change either the statute or Constitution for the benefit of relator. The furnishing of meals and rooms free of charge may well be termed charity; but the renting of those rooms to persons not members of relator, the furnishing of meals to persons not members of relator, and the operation of a barber shop, tailor shop, and soda fountain for all those who cared to patronize them, are business enterprises; * * * " (Emphasis ours.)

The Supreme Court, at a later date, in St. Louis Young Men's Christian Ass'n. v. Gehner, 47 S. W. (2d) 776, even more specifically determined the question at hand. After setting out a description of the three large buildings occupied by the Young Men's Christian Association in St. Louis, in which the court pointed out that there existed accommodations for approximately 740 persons, the court stated, l. c. 778:

"It is clear from the record that plaintiff is, in effect, conducting hotels or boarding houses. * * * "

As we read Section 9931, supra, it is sufficient if a building be kept, used or maintained for the accommodation of transient or permanent guests, with a total of ten rooms or more, whether advertisement is made of that fact or not.

It is apparent, therefore, that in answer to your first question, the Young Men's Christian Association, which is maintaining or keeping a building of more than ten rooms for transient or permanent guests, is operating a hotel, within the meaning of the Hotel Inspection Law.

With reference to your second question, it is necessary to consider the following constitutional provision and statute.

Section 6, Article X, of the 1945 Constitution provides as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or cor-

porate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article shall be void." (Emphasis ours.)

In pursuance to the commission granted by this section, the General Assembly has enacted House Committee Substitute for House Bill No. 471. In Section 5 of this Act we find the following exemption, which applies to institutions such as those mentioned supra:

"The following subjects shall be exempt from taxation for state, county or local purposes: * * * Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes." (Emphasis ours.)

Both the constitutional provision and the Act mentioned above exempt only property, real and personal, of exclusively religious and purely charitable organizations from taxation. It is unnecessary for us to decide whether the Young Men's Christian Association is an exclusively religious or purely charitable organization since, as is later pointed out, a license fee is not a property tax.

Section 9933, R. S. Mo. 1939, provides as follows:

"The fee for licenses to conduct a hotel in this state shall be three (\$3.00) dollars, except hotels containing fifteen rooms and less than twenty for the accommodation of guests, the license fee shall be five (\$5.00) dollars, and hotels containing twenty rooms and less

than thirty for the accommodation of guests the license fee shall be ten (\$10.00) dollars, and hotels containing thirty rooms and less than forty for the accommodation of guests the license fee shall be fifteen (\$15.00) dollars, and hotels containing forty rooms and less than fifty for the accommodation of guests the license fee shall be twenty (\$20.00) dollars, and hotels containing fifty rooms and less than seventy-five for the accommodation of guests the license fee shall be twenty-five (\$25.00) dollars, and hotels containing seventy-five rooms and less than one hundred for the accommodation of guests the license fee shall be thirty (\$30.00) dollars, and hotels containing one hundred rooms and less than two hundred for the accommodation of guests the license fee shall be thirty-five (\$35.00) dollars, and hotels containing two hundred rooms and less than three hundred for the accommodation of guests the license fee shall be forty (\$40.00) dollars, and hotels containing three hundred rooms and less than four hundred for the accommodation of guests the license fee shall be forty-five (\$45.00) dollars, and hotels containing four hundred rooms and more for the accommodation of guests the license fee shall be fifty (\$50.00) dollars; which shall be paid to the food and drug commissioner before said license is issued, and said license shall be kept in the office of said place in a conspicuous manner, properly framed. Said license may be revoked by the commissioner at any time when the law or regulations are not being complied with."

As pointed out in State ex rel. St. Louis Young Men's Christian Association v. Gohner, supra, the renting of rooms is a "business enterprise," and a tax on such an enterprise would apparently not be a "property tax."

State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, a decision by the Missouri Supreme Court, points out the various classes of taxes and the application of the exemptions set out in Section 6 of Article X of the Constitution, supra, to such taxes. We find the following in the court's decision, 1. c. 413-414:

" * * * It has been said that taxes fall naturally into three classes, namely, capitation or poll taxes; taxes on property, and excises. 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word however has come to have a broader meaning and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.' * * * * It will be observed that the exemptions granted by the Constitution and the statute, supra, are limited by express terms to the real and personal property of the several bodies mentioned. Accordingly, Article X, Section 6 of the Constitution has been held to have no application to collateral inheritance taxes (State ex rel. v. Henderson, 160 Mo. 190, 80 S. W. 1093), nor to license fees (State v. Distilling Co., 236 Mo. 219, 139 S. W. 453). And we think in this instance the statute does not impinge upon the constitutional provision pointed out, nor violate the statute relied on, and is valid." (Emphasis ours.)

Since Section 9953, supra, specifically provides a "license fee," it obviously is not affected by the constitutional provision or House Committee Substitute for House Bill No. 471, mentioned above.

In Salvation Army v. Hohn et al., 188 S. W. (2d) 826, the Missouri Supreme Court again points out the manner in which the Young Men's Christian Association conducts its enterprises, and refers to the cafeteria service and the transient rates charged to those occupying rooms for less than a week as indicative of services of a commercial nature. A contrast is made with the services performed by the Salvation Army. The case has no application to the question of an exemption for a license fee, but is mentioned because it confirms the views of the Supreme Court as to the facts set out in the case of State ex rel. v. Gehner, supra.

A reference to decisions in other states reflects decisions in harmony with State ex rel. Missouri Portland Cement Co. v. Smith, supra. In Kentucky, where the constitutional provision exempts charitable institutions themselves, rather than their real or personal property, the Kentucky Court of Appeals held that such exemption did not apply to a regulatory fee charged for the doing of certain business or for the supervision of vehicles on the highways. In that case, Gray v. Methodist Episcopal Church, South, Widows and Orphans Home, 114 S. W. (2d) 1141, the Home claimed an exemption from the payment of the fee for registration of a motor vehicle under the laws of Kentucky. In denying this claim, the court stated, 1. c. 1144-1145:

"The principle enunciated in the foregoing cases is well stated in 26 R.C.L. p. 17, section 4, as follows: 'Some governments derive considerable revenue from a judicious exercise of the power of regulation; but since a tax is a charge imposed for the purpose of raising revenue, a charge primarily imposed for the purpose of regulation is not a tax, and is not subject to the constitutional limitations upon the power of taxation. * * * If the primary purpose of the legislature in imposing such a charge is to regulate the occupation or the act, the charge is not a tax even if it produces revenue for the public.' See, also, Chadock v. Day, 75 Mich. 527, 42 N.W. 977, 4 L.R.A. 809, 13 Am. St. Rep. 468.

"As bearing somewhat on the question at issue, it might be pointed out that we have held that public institutions and public charities are not exempted from the payment of special assessments (street improvements), although their exaction, followed by a failure to pay, creates a lien on the real property. In the case of City of Mt. Sterling v. Montgomery County, 152 Ky. 637, 153 S. W. 952, 953, 44 L.R.A. N.S., 57, in discussing this question, and with direct reference to section 170 of the Constitution, we said: 'This constitutional and statutory exemption from taxation only refers to general ad valorem or property taxes that may be levied by the state, city, county, or taxing district under authority of law.'

* * * * *

"We, therefore, declare the rights of the parties to this controversy to be: The appellant should register the car of appellee upon the payment of the fee for such registration in the effect when it is sought to obtain a certificate, upon appellee's showing title, and in other respects complying with the motor vehicle registration law then in effect. * * * "

CONCLUSION

In view of the above authorities, it is our conclusion that the exemption from taxation set out in Section 6, Article X, of the Missouri Constitution of 1945, and in House Committee Substitute for House Bill No. 471, does not exempt the Young Men's Christian Association of St. Louis from the payment of the hotel license fees required by Section 9933, R. S. Mo. 1939.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

STATE BOARD OF HEALTH: Adoption subsequent to 1917 must
be by court decree.

May 9, 1946

FILED

45

5/3

Honorable R. M. James
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"We have received several requests to record the birth of persons who state they were adopted under the 'Common Law Adoption Custom of the State of Missouri, which prevailed until 1917.'

"We should like an opinion from your office as to whether an adoption executed previous to 1917 under the Common Law Adoption Custom would be legally recognized."

In order to fully answer your request it is necessary to review the history of adoption in this State.

At the outset, it must be noted that adoption was unknown to the old common law of England. *Hockaday vs. Lynn*, 200 Mo. 456. It appears to have been known to and recognized by the ancient Egyptians, Babylonians and Greeks, and was popular in early Roman times, and is included in the Code of Napoleon. *Lamb vs. Feehan*, 276 S.W. 71. Therefore, when you speak of the "Common Law Adoption Custom of the State of Missouri" in your request such a statement is a misnomer, because there is no such thing as adoption at common law, adopted by this State in 1816.

May 9, 1946

Adoption exists solely as a creature of statute. *Niehaus vs. Madden*, 348 Mo. 770, 155 S.W. (2d) 141. The first time our Legislature recognized such procedure was in 1857 when they provided for what is commonly known as "adoption by deed" (Laws of Missouri, 1857, page 59). Under this act a person may adopt a child as his heir "by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyances of real estate." Such a method continued in force in this State until 1917, when the Legislature repealed what was then Article 1 of Chapter 20, of the Revised Statutes of Missouri, 1909, which article was in substance the same as that enacted in 1857, and enacted in lieu thereof a law providing that any person could adopt another person as his child by a decree of the juvenile division of the Circuit Court (Laws of Missouri, 1917, page 193), which act is now Article 1, Chapter 56, R.S. Mo. 1939.

As was succinctly said in *Niehaus vs. Madden*, 155 S.W. (2d) 141, 1.c. 144:

"* * * Prior to 1917 the law of this state permitted adoption by means of a deed executed, acknowledged and recorded in the same manner as a deed to real estate by the adopter. R.S. Mo. 1909, Sec. 1671. Since 1917 adoption must be effected by a decree of the proper juvenile court. Laws of 1917, pp. 193-195, Rev. St. 1939, Sec. 9608, et seq."

The status of the adopted child prior to 1917 under "adoption by deed" is given in *Holloway vs. Jones*, 246 S.W. 587, 1.c. 590, as follows:

"* * * The act of adoption gave the child no right of inheritance not subject to the right of testamentary disposition. It simply constituted him an heir and gave him the same right to support and maintenance and proper treatment as is enjoyed by natural children against their

May 9, 1946

parents. In so far as the instrument possessed any of the elements of contract, it was a contract between the state and the adopting parent for the use and benefit of the child. Even the word 'child' was not used in its ordinary sense of juvenility, but simply to represent the relation of parent and offspring which it authorized. * * * ".

After 1917 "Adoption is a juridical act which creates between two persons a relation of purely civil nature, similar to that existing between a natural parent and his child. In other words, it is an act by which one person who is not the natural parent of another creates between himself and that other a complex or aggregate of legal relationships, rights, privileges, powers, immunities, etc., which are identical with those which the law creates between a natural parent and his child." (Niehaus v. Madden, 155 S.W. (2d) 141, l.c. 144).

The only difference between the two types of adoption other than the manner in which said adoption comes into existence is, that under the adoption by deed the child inherited only from his adopting parent or parents, while under the later law said child could inherit from the adopter's kindred. McIntyre vs. Hardesty, 149 S.W. (2d) 334.

It has been ruled in this State that since adoption is a creature of statute that the statute must be strictly, or at least substantially, complied with, in order to effect a valid adoption. Rochford vs. Bailey, 17 S.W. (2d) 941, 322 Mo. 1155; Fienup vs. Stamer, 28 S.W. (2d) 437.

As was said in Rochford vs. Bailey, 17 S.W. (2d) 941, l.c. 944:

"The statute (sections 1095-1103, R.S. 1919) comprehends within itself a complete scheme for the adoption of children; it is a code within itself. Provisions of two sections of the general code (sections 1196, 1203, R.S. 1919)

are incorporated therein by specific reference; aside from these the general code is without application. The validity of the proceeding which culminated in the purported decree of adoption involved in this case must therefore be gauged by the adoption statute standing alone."

Therefore, any statutory adoption previous to 1917, may only be by a decree of the proper juvenile court. However, adoptions prior to 1917 which complied with the statutes then in effect are legal.

The above is a history of the statutory enactments relating to adoption, and the interpretation of such statutes by our courts. It must be pointed out, however, that Missouri recognizes another form of adoption, this State being the only State in the Union which does recognize an adoption other than by statute. 2 C.J.S. page 372.

Our Supreme Court in the case of Sharkey vs. McDermott, 91 Mo. 647, decided in 1887, for the first time enforced an agreement to adopt, which agreement had never been recorded as required by statute. Since that time the court in numerous cases has held that a court of equity will enforce a parol contract of adoption, and decree that the child is an adopted child and an heir of the adopting parents where the contract has been fully performed by the child, and it would be inequitable to deny adoption. *Lynn v. Hockaday*, supra; *Grantham v. Gossett*, 182 Mo. 651, 81 S.W. 895; *Signaigo v. Signaigo* (Mo. Sup.) 205 S.W. 23; *Barnett v. Clark*, (Mo. Sup.) 252 S.W. 625; *Kerr v. Smiley* (Mo. Sup.) 239 S.W. 501; *Dillmann v. Davison* (Mo. Sup.) 239 S.W. 505; *Remmers v. Remmers* (Mo. Sup.) 239 S.W. 509, 514; *Craddock v. Jackson* (Mo. Sup.) 223 S.W. 924; *Fishback v. Prock*, 311 Mo. 494, 279 S.W. 38; *Johnson v. Antry*, (Mo. Sup.) 5 S.W. (2d) 405; *Carlin v. Bacon*, 322 Mo. 435, 16 S.W. (2d) 46, 69 A.L.R. 1.

This rule as laid down by our Missouri courts, is given in 2 C.J.S., page 377, as follows:

May 9, 1946

"* * * Accordingly, the statutory method of adoption is considered as merely permissive and does not prevent persons from adopting children in any lawful manner, and under the doctrine that two or more parties who are competent to contract may enter into any agreement or contract they see fit, if it is not in violation of morality and good conscience, an adoption may be accomplished by a fully executed, in the sense that the child was taken into the family and reared, contract of adoption, irrespective of the fact that the statutory procedure for adoption was not followed. Accordingly, in this jurisdiction, irrespective of the fact that the statutory provisions are specific, such statutory provisions do not oust a court of equity of jurisdiction to determine the relation existing between the parties."

The reason why such "equitable adoption" is recognized is because: "where one takes a child into his home as his own, receives the love, affection, companionship, and service of the child to aid and cheer him along the pathway of life, and to comfort him in the declining years of his childless old age, after his death, it would be inequitable and unfair to permit his kindred, who stand in his shoes, to say to the child, you have no right incident to the status of parent and child because deceased violated the law in entering into such a status without the approval of the juvenile court. To so hold would be to permit guilty parties to take advantage of their own wrong." (Drake v. Drake, 43 S.W. (2d) 556, 1.c. 559).

There seems to be no doubt that a person whom a court of equity has decreed to be entitled to have an agreement of adoption enforced is, for all intents and purposes, an adopted child. In Taylor vs. Coberly, 327 Mo. 940, 38 S.W. (2d) 1055, 1.c. 1060, the court said: "It is well settled in the jurisprudence of this state that a court of equity has jurisdiction to enforce a parol contract of adoption and decree the child to be an adopted child * * *". (Emphasis ours.)

May 9, 1946

In Rauch vs. Metz, 212 S.W. 357, l.c. 362, our Supreme Court said:

"* * * There is, however, no principle of law more firmly settled in this state than that that relation (adoption) may be created by the acts and undertakings of the parties fully executed on behalf of the child. * * *".
(insertion ours.)

In Holloway vs. Jones, 246 S.W. 587, the court held that whether the adoption of the child was by statute or by contract the child's "rights, obligations and duties are the same." Therefore, it will be seen that when a court of equity decrees that a child has been adopted by a person under an agreement, either oral or written, that such child is an adopted child even though the adopting parent has not complied with the statutory requirements.

CONCLUSION.

It is, therefore, the opinion of this Department that since 1917 the only statutory method of adoption in Missouri is by a decree of the juvenile division of a circuit court while prior to 1917 the only statutory method was by a deed of adoption filed with the recorder of deeds. However, a person may be declared an adopted child by decree of a court of equity in enforcing an agreement to adopt.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

AM O'K:ir

FILED

45

May 13, 1946

Honorable Owen G. Jackson
Superintendent of Insurance
of Missouri
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge transmission of certified copies of the records of the proceedings of the shareholders and board of directors of the Kansas City Fire & Marine Insurance Company, a Missouri corporation organized under Article 8, Chapter 37, R.S. Mo. 1939, had and placed of record in the records of said company on May 13, 1946, whereby the articles of incorporation were amended to increase the capital stock of said company, and your request for an opinion from this Department, as to the regularity and legality of such proceedings.

We have examined the certified copies of the records of these proceedings, and it is the opinion of this Department that such proceedings in every particular, comply with the laws of the State of Missouri, and that such proceedings are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

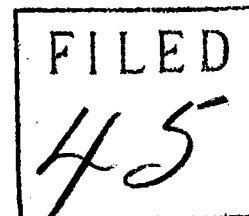
Respectfully submitted,

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC:ir

BOARD OF HEALTH:) Fee for inspection of soft drinks and
FEE:) beverages.

May 13, 1946



5/14

R. M. James, M. D.
State Health Commissioner
Jefferson City, Missouri

Attention: Mr. Warren E. Lofton,
Supervisor Food &
Drug Division

Dear Sir:

This will acknowledge receipt of your request
for an official opinion, which reads:

"The question arises, has this Division the authority to collect back Beverage Inspection fees in which the Bottler paid the State of Missouri 3/10¢ a case instead of 3/10¢ a gallon."

The 62nd General Assembly enacted House Bill 235, pages 585-591, Laws of Missouri, 1943, with an emergency clause. Said act was approved by the Governor on July 20, 1943. Section 3 of said act provides for a license fee of one dollar and for an inspection fee to be paid by wholesale manufacturers of soft drinks or beverages of three tenths cent for each gallon manufactured or sold in this state. However, such inspection fee shall not in any case exceed four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity. Said section reads as follows:

"A license fee of one dollar (\$1.00) shall be paid by each manufacturer of soft drinks or beverages required to be licensed under the provisions of this Act; and in addition thereto an

inspection fee shall be paid by wholesale manufacturers of soft drinks or beverages of three tenths cent for each gallon of such beverage manufactured or sold in this state, but the fees for inspection shall not exceed four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, as determined by the rated capacity of the machines therein for an eight hour day as rated by the manufacturer of such machines; and for inspection of all fountain syrups, flavors or extracts used in the manufacture or concoction of beverages for retail sales, not otherwise inspected, an inspection fee shall be paid equal to three cents per pound of carbonic gas used in the manufacture or concoction of such beverages or drinks. All fees received shall be paid into the state treasury."

There is a well established rule of statutory construction that statutes should be construed so as to ascertain and give effect to the legislative intent expressed therein. See *Wallace v. Woods*, 102 S. W. (2d) 91, 340 Mo. 452.

Under the foregoing provision providing for an inspection fee, it is the opinion of this department that wholesale manufacturers of soft drinks or beverages shall pay a license fee of one dollar and also an inspection fee amounting to three tenths of a cent for each gallon of such soft drinks or beverages manufactured or sold in this state. However, if such inspection fee is greater than four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, then the wholesale manufacturer may pay on the latter basis.

You also inquire as to your authority to collect back Beverage Inspection Fees. While your request does not state when these inspection fees accrued, it is our understanding that they were all within the last three years. In the foregoing act passed by the 62nd General Assembly there

R. M. James, M. D.
State Health Commissioner - 3

is no specific provision limiting the state as to when it may collect such inspection fees. However, under Section 1040, R. S. Mo. 1939, it is provided that the limitations proscribed in articles 8 and 9 of said chapter shall apply to actions brought in the name of the state, or for its benefit, in the same manner as actions by private parties. Also, in State v. Dalton, 182 S. W. (2d) 311, the Supreme Court of Missouri held that for the state to recover delinquent income taxes, proceedings must be instituted within the general five-year statute of limitations, in the absence of a limitation provision in the income tax law. In so holding the Court said, 1. c. 313:

"State v. Farmers' Trust Co., of Macon, Mo. Sup., 31 S. W. 2d 1069, and State ex rel. Wyatt v. Cantley, 325 Mo. 67, 26 S. W. 2d 976, hold that the statutes relating to insolvent banks, and particularly Section 11716, R. S. 1919, Mo. R.S.A. Sec. 7928, which required claims against insolvent banks to be presented within four months, did not apply to claims by the state for taxes. But as those cases specifically point out, there was no provision in that special statute of limitation making it applicable to the state and so the state was not bound by it. In this case, as the state says, there is no statute of limitations in the income tax law. And the general statute of limitations specifically includes 'actions brought in the name of this state' and if, as we hold, litigation to enforce the collection of the state's claims for income taxes is an 'action' or a 'suit' it certainly falls within the plain provisions of the statute and is barred."

Therefore, since these delinquent inspection fees all became due within the last three years, the statute of limitations does not preclude the state from collecting same.

R. M. James, M. D.
State Health Commissioner - 4

Conclusion

It is, therefore, the opinion of this department that each manufacturer of soft drinks, subsequent to July 20, 1943, shall pay a license fee of one dollar, and in addition thereto wholesale manufacturers of soft drinks or beverages shall pay an inspection fee amounting to three tenths of a cent for each gallon manufactured or sold in this state. However, if such inspection fee is greater than four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, then said wholesale manufacturer may pay in accordance with the latter amount.

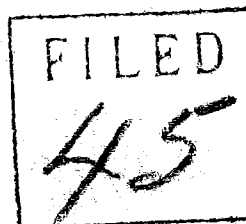
Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARM:EG



May 16, 1946

5/16

Honorable Owen G. Jackson
Superintendent of Insurance
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashley,
Counsel.

Dear Mr. Jackson:

This will acknowledge your transmission to this Department of copies of articles of incorporation, together with copies of publication and proof of publication of notice of the Merchants Mutual Casualty Company, of Kansas City, Missouri, and declaration of intention to form a mutual insurance company under the provisions of Article 7, Chapter 37, R.S. Mo. 1939.

You request the opinion of this Department as to the legality of such documents and proceedings in triplicate.

We have examined these documents and it is the opinion of this Department that all of them comply with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri, or the Constitution of the United States.

Respectfully submitted,

GWC:ir

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

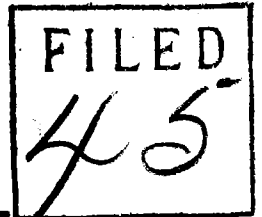
INTER-INDEMNITY & RECIPROCAL INSURANCE CONTRACT: In an application for license for reciprocal or inter-indemnity insurance contracts, the attorney in fact in qualifying for the license under paragraph (f) of Sec. 6080, R.S. Mo. 1939, need not state in the application that "100 separate risks" have been taken for automobile insurance. Automobile insurance under said paragraph (f) is exempted from the "100 separate risks" clause. Under said clause (f) the word "or" permits either 100 applications to be made on 1000 motor vehicles, or 1 application to be made covering 1000 motor vehicles. Bodily injury and property damage may be included in the aggregate sum of

May 29, 1946

\$1,500,000.00 liability. The \$1,500,000.00 of insurance contracted under said paragraph (f) may be covered in three applications of \$500,000.00 each.

Honorable Owen C. Jackson
Superintendent of Insurance
Jefferson City, Missouri

6/5



Dear Mr. Jackson:

This will acknowledge your letter requesting an opinion on the effect of the provisions of paragraph (f) of Section 6080, R.S. Mo. 1939. Your letter is as follows:

"I would appreciate receipt of your opinion interpreting subdivision (f) of Section 6080, R.S. Mo., 1939, which reads as follows:

"That except as to the kinds of insurance hereinafter specifically mentioned in this subdivision, applications have been made for indemnity upon at least one hundred separate risks aggregating not less than one and one-half million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective. In the case of employer's liability or workmen's compensation insurance, applications shall have been made for indemnity upon at least one hundred separate risks covering a total pay roll of not less than two and one-half million (\$2,500,000.00) dollars as represented by executed contracts or bona fide applications to become concurrently effective. In the case automobile insurance applications shall have been made for indemnity upon at least one thousand motor vehicles or for insurance aggregating not less than one and one-half

million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective on any or all classes of automobile insurance effected by said subscribers through said attorney.'

"The last sentence specifically mentions automobile insurance. Is it necessary that applications be made upon at least one hundred separate risks, or may one application be made covering one thousand motor vehicles, or should there be one thousand separate applications, each upon a motor vehicle?

"Does the provision 'or for insurance aggregating not less than one and one-half million (\$1,500,000.00) dollars' constitute an alternative which may be used in lieu of applications upon at least one thousand motor vehicles, and can bodily injury and property damage be included in the aggregate sum mentioned above? Could applicants qualify in this event with three risks of \$500,000.00 limits, each accident?"

Your letter submits four distinct questions to be determined. The first question is:

"Is it necessary that applications be made upon at least one hundred separate risks, or may one application be made covering one thousand motor vehicles, or should there be one thousand separate applications, each upon a motor vehicle?"

The second question is:

"Does the provision 'or for insurance aggregating not less than one and one-half million (\$1,500,000.00) dollars' constitute an alternative which may be used in lieu of applications upon at least one thousand motor vehicles,"

The third question is:

"Can bodily injury and property damage be included in the aggregate sum mentioned above?"

The fourth question is:

"Could applicants qualify in this event with three risks of \$500,000.00 limits, each accident?"

Section 6080, is a part of Article 11, Chapter 37, R.S. Mo. 1939, dealing with Inter-Indemnity Contracts--Reciprocal or Inter-Insurance Contracts, ordinarily called "reciprocal" insurance.

Section 6078, R.S. Mo. 1939, names the conditions and designates the procedure to be followed in carrying on such business.

Section 6079, R.S. Mo. 1939, requires that such contracts of reciprocal insurance shall be executed by an attorney in fact acting for the contractors who are called "subscribers". Then we come to said Section 6080, which is the subject of your inquiry. We think it well to quote the first paragraph of said Section 6080, which is as follows:

"Such subscribers so contracting among themselves shall, through their attorney, file with the superintendent of insurance of this state, a declaration verified by the oath of such attorney setting forth:"

The above quoted excerpt from said Section 6080, is the preamble to what is set forth in said paragraph (f) constituting along with other facts stated in other paragraphs in said Section as the case may require, the declaration of the company. Said paragraph (f) of said Section 6080 is as follows:

"(f) That except as to the kinds of insurance hereinafter specifically mentioned in this subdivision, applications have been made for indemnity upon at least one hundred separate risks aggregating not less than one

and one-half million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective. In the case of employer's liability or workmen's compensation insurance, applications shall have been made for indemnity upon at least one hundred separate risks covering a total pay roll of not less than two and one-half million (\$2,500,000.00) dollars as represented by executed contracts or bona fide applications to become concurrently effective. In the case of automobile insurance applications shall have been made for indemnity upon at least one thousand motor vehicles or for insurance aggregating not less than one and one-half million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective on any or all classes of automobile insurance effected by said subscribers through said attorney."

The kinds of insurance specifically mentioned in said paragraph (f) are: a) "Employer's liability or workmen's compensation insurance", and, b) "Automobile insurance".

We will observe that said paragraph (f) begins with this significant language: "That except as to the kinds of insurance hereinafter specifically mentioned in this subdivision, applications have been made for indemnity upon at least one hundred separate risks aggregating not less than one and one-half million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective. * * *".

It becomes apparent then that the meaning of the quoted part of said paragraph (f) makes exceptions out of "employer's liability or workmen's compensation insurance" and "automobile insurance". In other words, they being the only two kinds of insurance specifically mentioned in said paragraph (f), the requirement as to there being at least one hundred separate risks aggregating not less than one and one-half

million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective, has nothing to do with employer's liability or workmen's compensation insurance, or with automobile insurance.

Now, we think we may proceed to answer the specific questions contained in your letter, and as numerically set forth hereinabove.

Considering the first one of said questions, it is not necessary, in applications for automobile insurance, to have "one hundred separate risks", because, automobile insurance is one of the kinds of insurance excepted by the terms of said Section 6080 from such requirements, and that being not restricted to the one hundred application feature of said paragraph (f) of said Section 6080, one thousand separate applications, each upon a motor vehicle need not be made, but one application may be made for liability covering one thousand motor vehicles.

Proceeding to the second question contained in your letter, we believe the word "or" is a coordinating particle designating an alternative choice to be used in place of making applications upon at least one thousand motor vehicles. The word "or" is defined in Webster's International Dictionary as: "the correlative of either". We believe it was intended by the Legislature to be so used and has that meaning and effect in this statute. We believe that part of said Section is in the alternative so that one thousand applications could be made either on one thousand motor vehicles, or one application may be made covering one thousand motor vehicles for insurance aggregating not less than \$1,500,000.00.

Answering the third one of said questions, we believe bodily injury and property damage may be included in the aggregate sum of \$1,500,000.00 if this kind of insurance is included within the kinds of insurance to be exchanged. This is clearly indicated in the last part of said paragraph (f) where it says: "not less than one and one-half million (\$1,500,000.00) dollars represented by executed contracts or bona fide applications to become concurrently effective on any or all classes of automobile insurance effected by said subscribers through said attorney." (Underlining ours.) This, we think, is broad enough language to include both property damage, bodily injury or any other

kind or character of automobile insurance. The statute says all classes of automobile insurance affected by said subscribers through said attorney. (underscoring ours.) We believe it was the intention of the Legislature to include any class of automobile insurance in the sum named by the statute.

Proceeding now to the fourth and last one of said questions submitted in your letter, we believe applicants could qualify for the \$1,500,000.00 insurance by making applications for and procuring three risks of \$500,000.00 each to make the aggregate of \$1,500,000.00. The statute very clearly indicates it to have been the intention of the Legislature to permit multiple applications to qualify for the \$1,500,000.00 insurance. This is indicated by the use of the plural word "applications", and by the use of the word "aggregating". Aggregating is defined as the present participle of the verb "aggregate" in Webster's International Dictionary, page 49, as follows: "to bring together; to collect or create into a mass or form". We think there is no doubt that this statute gives authority to qualify for such insurance with three risks of \$500,000.00 each.

CONCLUSION

It is, therefore, the opinion of this Department that:

1) That said paragraph (f) of said Section 6080, R.S. Mo. 1939, does not require the attorney in fact in reciprocal or inter-indemnity insurance in applying for a license, to declare that "100 separate risks" in automobile insurance have been taken, because automobile insurance is exempted from the "100 separate risks" clause in said paragraph.

It is further the opinion of this Department:

2) That the use of the word "or" in said paragraph (f) is used as an alternative, permitting either 1000 separate applications to be shown on 1000 motor vehicles, or 1 application may be shown covering 1000 motor vehicles to qualify for such license.

It is further the opinion of this Department that:

3) Bodily injury and property damage may be included in the aggregate sum of \$1,500,000.00 of risks named

Honorable Owen G. Jackson -7-

in said paragraph (f), which in its terms includes all classes of automobile insurance, if these kinds of insurance are within the kinds of insurance to be effected by the reciprocal group submitting such risks.

It is further the opinion of this Department that:

4) Applications of \$500,000.00 each may be shown upon 1000 motor vehicles aggregating not less than one and one-half million dollars.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

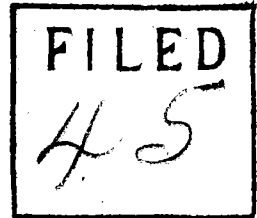
APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

STATE BOARD OF HEALTH: Question of what the surname of a child should be.

June 12, 1946



Dr. R. M. James
State Health Commissioner
The State Board of Health
Jefferson City, Missouri

Dear Sir:

We heroby acknowledge receipt of your letter to this office requesting an opinion, as follows:

"We should like to have an opinion from your office relative to the following matter.

"Under what surname should a child be registered when the father and mother are divorced, the mother remarries and gives birth to a child, who is actually the child of the first husband. Should the birth be registered under the name of the first husband, the actual father, or in the name of the second husband?

"This office has had several requests recently from hospitals and doctors relative to such cases. Your opinion at the earliest possible date will be greatly appreciated."

Sections of the Missouri statutes requiring the registration of births are covered in Sections 9760, 9771, 9772, 9773, 9774, 9775 and 9782, R. S. Mo. 1939.

Section 9760 provides:

"It shall be the duty of the state board of health to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state. The said board shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time promulgate any additional forms and amendments that may be necessary for this purpose."

Section 9771 requires that:

"All births that occur in the state shall be immediately registered in the districts in which they occur, as hereinafter provided."

Section 9772 provides:

"It shall be the duty of the attending physician or midwife to file a certificate of birth, properly and completely filled out, giving all the particulars required by this article, with the local registrar of the district in which the birth occurred, within ten days after the date of the birth. And if there be no attending physician or midwife, then it shall be the duty of the father or mother of the child, householder or owner of the premises, manager or superintendent of public or private institutions in which the birth occurred, to notify the local

registrar within ten days after the birth of the fact of such birth having occurred. It shall then, in such case, be the duty of the local registrar to secure the necessary information and signature to make a proper certificate of birth: Provided, that in cities the certificate of birth shall be filed at a less interval than ten days after birth, if so required by municipal ordinance (or regulation) now in force or that may hereafter be enacted."

Section 9773 provides:

"The certificate of birth shall contain the following items:

"(1) Place of birth, including state, county, township or town, village or city. If in a city, the ward, street and house number; if in a hospital or other institution, the name of the same to be given, instead of the street and house number.

"(2) Full name of child. If the child dies without a name, before the certificate is filed, enter the words 'died unnamed.' If the living child has not yet been named at the date of filing certificate of birth, the space for 'full name of child' is to be left blank, to be filled out subsequently by a supplemental report, as hereinafter provided.

"(3) Sex of child.

"(4) Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural birth, giving number of child in order of birth.

"(5) Whether legitimate or illegitimate.

"(6) Full name of father.

"(7) Residence of father.

"(8) Color or race of father.

"(9) Birthplace of father; city or town, state or foreign country.

"(10) Age of father at last birthday, in years.

"(11) Occupation of father. (Answers shall not be recorded to items 6, 7, 8, 9, 10 and 11 in case of illegitimate births.)

"(12) Maiden name of mother.

"(13) Residence of mother.

"(14) Color or race of mother.

"(15) Birthplace of mother; city or town, state or foreign country.

"(16) Age of mother at last birthday, in years.

"(17) Occupation of mother.

"(18) Number of child of this mother, and number of children of this mother now living.

"(19) Born at full term.

"(20) The certificate of attending physician or midwife as to attendance at birth, including statement of year, month, day and hour of birth, and whether the child was alive or dead at birth. This certificate shall be signed by the attending physician or midwife, with date of signature and

address; if there is no physician or midwife in attendance, then the father or mother of the child, householder or owner of the premises, or manager or superintendent of public or private institution, or other competent person, whose duty it shall be to notify the local registrar of such birth, as required by section 9772 of this article.

"(21) Exact date of filing in office of local registrar, attested by his official signature, and registered number of births, as hereinafter provided.

"All certificates, either of birth or death, shall be written legibly, in unfading black ink, and no certificate shall be held to be complete and correct that does not supply all of the items of information called for herein, or satisfactorily account for their omission."

Section 9774 requires that the given name of the child must be registered, and sets out the necessary action to be taken if the certificate of birth is presented without the statement of the given name.

Section 9775 provides for the action to be taken if the certificate of birth has not been registered prior to the taking effect of this article.

Section 9782 provides for the penalties to be imposed if the foregoing sections are not carried out.

By the common law, since early times, a legal name has consisted of one surname and one given name, the given name being used first and the surname last. Anciently, the given name was regarded as the more important of the two, but in modern days the surname has become the principal name. 45 C.J. 367.

In *E.H. Perry & Co. v. Langbehn*, 113 Tex. 72, 252 S.W. 472, the Court states that a name is a word

June 12, 1946

or words, designation or appellation used to distinguish a person or thing or class from others.

The surname or family name of a person is that which is derived from the common name of his parents, or is borne by him in common with other members of his family. 45 C.J. 368.

Therefore, in order to determine what the surname of the child in question should be under the above premise it will be necessary to determine the legal meaning of the word "parents".

In McDonald et al. v. Texas Employers' Ins. Ass'n., 267 S.W. 1074, the Court states, 1.c. 1075:

"(1) The primary meaning of the term 'parent' is one who procreates, begets, or brings forth offspring, as father or mother; hence, when the term is literally interpreted, it can only include a father or mother related by blood to the child, and by the same token would, of course, exclude adopting parents and all others who by reason of the facts or circumstances stand in loco parentis. * * * "

In the dissenting opinion in Lanferman et al. vs. Vanzile, 150 Ky. 751, 150 S.W. 1008, the Court states:

" * * * That the word "parent" * * *
* * * means natural parents, and not
parents by adoption, cannot be doubted.
* * * * * the word "parents", both
by derivation and common understanding,
means the natural parents'".

In 46 C.J. 1212, it is stated:

"The term 'parent' primarily means one who produces young, one who procreates, begets, or brings forth an offspring. The word ordinarily is employed as meaning the father or mother related

Dr. R. M. James

-7-

June 12, 1946

by blood, sometimes including a putative or 'natural' father, but sometimes limited to a father or mother of a legitimate offspring. * * * * ".

In consideration of the above authorities, we believe the word "parent" refers to the actual father, and, since a person's name is derived from their parents, the child in question should be registered under the name of the first husband. There is a presumption that a child born in wedlock is the child of the first husband, but this presumption is overcome by the facts stated in your letter, that the father is actually the first husband.

Conclusion

Therefore, it is the opinion of this department that a child, conceived during one marriage and born during a subsequent marriage, should be registered under the name of the first husband, the actual father.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:ir

FOREIGN INSURANCE COMPANIES: Foreign insurance companies are not required to comply with either Sec. 5809 or Sec. 5826, R.S. Mo. 1939, with respect to capital stock being paid up in full, if the State of its domicile does not so require. A foreign insurance company does not violate the terms of Sec. 6035, R.S. Mo. 1939, if it holds some of its own stock, not absolutely or as collateral, but holds the same merely for conversion purposes of Preferred stock into Common stock or Common stock into Preferred stock.

June 19, 1946

Honorable Owen G. Jackson
Superintendent of Insurance
of Missouri
Jefferson City, Missouri

6/21



Dear Mr. Jackson:

This will acknowledge your letter requesting an opinion from this Department.

Your letter is as follows:

"A life insurance company organized and doing business under the laws of the state of South Carolina has applied for license to do business in this state. It has duly submitted to this Department a proper certificate showing that it has complied with the laws of South Carolina, and is authorized to, and is doing business in that state.

"Another submission in the form of a copy of this last Annual Statement reveals that the company owns approximately 7,500 shares of its own capital stock. It also shows that although the whole of the capital stock has not been paid up and is not now outstanding, \$100,000.00 of its capital stock has been paid up and is outstanding.

"Is it necessary that this foreign insurance company comply with the same requirement prescribed for companies organized under the laws of this state, with specific reference to that portion

of Sections 5809 and 5826 R.S. Mo. 1939 providing that the full amount of the capital stock named in the Articles of Association shall be paid up and outstanding before it may be licensed?

"Your opinion on the above and foregoing is respectfully requested."

In a later communication with this Department, Mr. Ralph C. Lashly, Counsel for your Department, quotes a letter from Mr. E. F. Averyt, President of the insurance company involved, showing the manner in which its Common stock is being held. Said quoted letter is as follows:

"Mr. Ralph C. Lashly, Counsel
Insurance Department
State of Missouri
Jefferson City, Missouri

Dear Mr. Lashly:

'In compliance with your letter of April 25th, we are herewith enclosing specimen copy of Series 'A' Common Stock certificate and specimen copies of each of the Preferred Stock certificates.

'The 436 shares of 6% Preferred with a par value of \$100.00 each have a right to convert into 10 shares Series 'B' Common Stock for each share of Preferred Stock. The 554 shares of 5% Preferred with a par value of \$100.00 each do not have any conversion rights. Therefore, 4,360 shares of the 11,850 shares of no par Common are reserved for the conversion rights of the 6% Preferred Stock.

'It was originally intended to sell the entire 990 shares of Preferred Stock with conversion rights which would have hypothecated 9,900 shares of the 11,850 shares of the no par Common Series 'B'

assigned to the company, but it was later decided to sell 554 shares of the Preferred Stock without the conversion rights. The balance of 1,950 shares of the Series 'B' Common was to be held for similar conversion rights in case it was decided to increase the company's capital with additional Preferred Stock issues.

'The number of shares of Series 'B' Common now being held by the company that is not hypothecated for the conversion rights of Preferred Stock, that is, 6,490 shares, is still being held for the purpose of conversion rights to future issues of Preferred Stock if and when the company decides to increase its capital stock.

Very truly yours,

E. F. Averyt
President."

The request for this opinion, in the light of your letter to this Department and the quoted letter of Mr. Averyt, necessarily brings up for construction Sections 5809 and 5826, R.S. Mo. 1939, and also our Section 6035, R.S. Mo. 1939, as to whether said Sections apply to foreign insurance companies, upon an application by such companies for certificate of authority to do business in this State.

Sections 5809 and 5826, are what we may very appropriately call "organization" statutes, referring only and having authority and effect only on, insurance corporations organized under the laws of Missouri. Section 5809 refers specifically in the early lines of said Section to Section 5803, R.S. Mo. 1939, with respect to the declaration to be filed under said Section 5803 by persons designated as incorporators of an insurance company in this State. Said Section 5803 in turn refers to Section 5800, Article 2, Chapter 37, R.S. Mo. 1939, which prescribes the procedure for the formation of an insurance company.

A careful reading of these statutes cited will disclose that they refer only to and regulate only the formation of insurance corporations in the State of Missouri under its laws.

Section 5826, R.S. Mo. 1939, specifies the amount of capital that any joint stock or stock and mutual insurance companies formed under the provisions of Article 2, Chapter 37, for the purposes mentioned in said Section 5800, must provide for in their articles of incorporation.

The statement is made in your letter, and is borne out by Mr. Averyt's copied letter, that although the whole of the capital stock of the foreign insurance company has not been paid up and is not outstanding, the company does have \$100,000.00 of its capital stock paid up and outstanding. Growing out of such statement of fact you ask, "is it necessary that this foreign insurance company comply with the same requirement prescribed for companies organized under the laws of this State with specific reference to that portion of said Sections 5809 and 5826, R.S. Mo. 1939, providing that the full amount of the capital stock named in the articles of association shall be paid up and outstanding before it may be licensed in this State." We think, under the terms of our said Sections 5809 and 5826, they being what we have heretofore designated "organization" statutes referring only to insurance corporations organized under the laws of Missouri, that the question of not having its full capitalization paid up does not bear upon that company's right to a certificate in this State, if it complies with all of our statutes required to be complied with by foreign insurance companies in order to obtain such certificate. If the State of South Carolina granted a certificate of authority to this insurance corporation when organized under its laws to transact insurance business in that State with that amount of capital paid up and outstanding, notwithstanding the full amount of its capitalization as provided in its articles of association has not been paid up and outstanding, neither our Section 5809 or Section 5826, would prevent such foreign insurance company from being licensed in this State.

That part of our said Section 6035, R.S. Mo. 1939, Article 10, Chapter 37, which is a part of our

General Statutory Provisions applying to all insurance companies, foreign as well as domestic, respecting the holding by an insurance company of its own stock, which here constitutes a part of the question we are now considering, is as follows:

"No insurance company shall, directly or indirectly, purchase or hold, either absolutely or as collateral, its own stock, after the same has been once issued: * * *".

In the quoted letter of Mr. Averyt it is stated that the holders of the 6% Preferred par value stock have the right to convert such stock into Common stock at the ratio of ten shares of Common stock for one share of such Preferred stock, and that the Common stock is held by the company for such conversion purpose.

Our said Section 6035, R.S. Mo. 1939, says that no insurance company "shall, directly or indirectly, purchase or hold, either absolutely or as collateral, its own stock, after the same has been once issued."

Since the foreign insurance company in question holds its own stock, in whatever amount it may be, for the purpose of conversion into other stock, we do not perceive how it would be holding such shares in violation of the terms of said quoted part of our said Section 6035, R.S. Mo. 1939. Resting the matter upon the language quoted in our said Section 6035, it was the evident intention of the Legislature in incorporating such language into said Section 6035, to prevent insurance companies from holding their own stock outright. It appears to be the case here that the Preferred par value stock held by the foreign company, being considered to be held for conversion, is dormant and inactive and not issued in the sense that our said Section 6035 has in mind.

"Conversion" is defined in Webster's New International Dictionary, definition 1 c, page 582, as: "From one thing to another by substitution."

It would thus appear that the foreign insurance company in question having been permitted to organize and

carry on its business in the State of its domicile without having the full amount of its capital paid in, it is not required to comply with the requirements prescribed for insurance companies organized under the laws of this State as are set forth in Sections 5809 and 5826, R.S. Mo. 1939, which require the full amount of capital to be paid up before being licensed. It also appears that said foreign insurance corporation is not proceeding contrary to our said Section 6035, Article 10, Chapter 37, R.S. Mo. 1939, on account of its owning and holding a block of its own stock for conversion purposes.

In the case being considered, however, it appears that the company in question has complied with the laws of its domicile, and that it need not comply with Sections 5809 and 5826, R.S. Mo. 1939, in order to obtain a certificate to do business in this State, and that it is not violating the terms of Section 6035, Article 10, Chapter 37, R.S. Mo. 1939, in holding a block of its stock for conversion purposes.

CONCLUSION.

It is, therefore, the opinion of this Department that the insurance company in question, to-wit: Colonial Life & Accident Insurance Company, Columbia, South Carolina, having complied with the laws of the State of its domicile by paying up at least \$100,000.00 of its capitalization, although not all of its authorized capital stock has been paid in full, said company need not comply with Sections 5809 and 5826, R.S. Mo. 1939, in order to obtain a certificate to do business in this State, for the reason said Sections apply only to companies organized under the laws of this State, and that said insurance company is not violating the terms of Section 6035, Article 10, Chapter 37, R.S. Mo. 1939, in reserving a block of its own stock to take care of the conversion rights of Preferred stockholders.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

GWC:ir

DIVISION OF HEALTH: Political subdivisions may continue to participate financially with the Division of Health for health services in their political subdivision.

July 2, 1946



Dr. R. M. James, Director
Division of Health
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter requesting an opinion of this department, which reads as follows:

"For many years this Department has co-operated with cities and counties in the maintenance of local health services.

"It is now called to our attention that one city in the State has withdrawn its financial assistance which consisted of payment of rent, etc. to the local district health office because they were not permitted to make such payments under the new Constitution.

"We would like an opinion from your office on the following question: Does Section 23, Article 6 of the new Constitution prohibit any city, county or other political sub-division in the State from participating financially with this Department in the operation and maintenance of health services? Such payment would include salaries, rent, travel or other expenses."

Section 23, of Art. VI of the Constitution of 1945, provides:

"No county, city or other political corporation or subdivision of the state shall own

or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

The above section was taken from Section 47, Art. IV and Section 6, Art. IX, Constitution of 1875. These sections have never been construed in the courts of this state as they apply to a political subdivision participating with the division of health in the operation and maintenance of health services.

Section 47 of Art. IV, Constitution of 1875, provides in part:

"The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * * *

Section 6, Art. IX, Constitution of 1875, provides in part:

"No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others. * * * * *

In the case of Jasper County Farm Bureau v. Jasper County, 315 Mo. 560, the county court appropriated money to the Jasper County Farm Bureau, a voluntary association. It was contended that this appropriation violated the above sections of the Constitution of 1875. The court held that this does not constitute a gift or grant of money to a private association and, in so holding, stated at l. c. 565:

"There are also many purposes for which public money may be appropriated from the use of which some persons derive more benefit than others, but this circumstance does not detract from the fact that their chief function is to administer to the public good, although the enjoyment and advantages derived from their maintenance are not distributed equally, even between members of the public who are situated alike or in the same class. If it were essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart."

There is no doubt that the appropriation of money for the protection of public health is an appropriation for public purposes. The general rule is stated in 39 C.J.S. Sec. 2, p. 811:

"It is a well recognized principle that the protection of the public health is one of the first duties of government. * * * * *

Further, in Central States Life Ins. Co. v. State, 80 S.W. (2d) 628, the Supreme Court of Arkansas stated at l. c. 629:

"* * * One of the highest duties a government owes its citizens is to protect their

health, from which it follows that money raised and expended for the promotion of the public health is a necessary expense of any well-regulated government. * * * * *

The participation of a political subdivision or city with the Division of Health in providing health services for its citizens is merely an attempt to provide the best service possible and to perform their long recognized duty. This is not a grant or loan in aid of a corporation, association or individual, but rather it is a cooperative venture with a state agency, and the outlay of money is for a well known public purpose.

This type of limitation on the powers of a political subdivision can also be found in the Constitution of 1865. At that time the railroads were expanding at a rapid rate throughout the middle west. Many of these railroad ventures were no more than wildcat schemes for the purpose of promoting stock sales. After many of our counties and cities had participated in these ventures, it was learned that they had contracted debts that were to live with them for many years. In order to stop the officials of a political subdivision from using public money for other than public purposes, these sections were added to our Constitution of 1875. Therefore it can readily be seen that the purpose of this type of constitutional provision was to keep political subdivisions from giving direct aid to a private corporation and not to prevent them from cooperating with state agencies in expending money for public purposes.

CONCLUSION

Therefore, it is the opinion of this department that Section 23 of Art. VI of the Constitution of 1945 does not prohibit a political subdivision or city from participating financially with the division of health in the operation and maintenance

Dr. R. M. James, Director

(5)

nance of health services for the citizens of the subdivision.

Respectfully submitted,

BERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

25 AUG 7 11 5-01 PM '46

DIVISION OF HEALTH: A Deputy State Commissioner of Health has jurisdiction throughout the County, including the cities of said County, and the laws of this State do not provide for a Deputy State Commissioner of Health in incorporated cities of less than 75,000 inhabitants.

July 16, 1946



Dr. R. M. James, Director
Division of Public Health and Welfare
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter requesting an opinion of this department, reading as follows:

"For quite a number of years this department has proceeded on the presumption that the Deputy State Health Officer for counties, who is an appointee of the local county court, had no jurisdiction within the incorporated limits of cities within that county, except in the small communities where no other means were available to accomplish protection of public health.

"We would like to have an opinion regarding the two following questions:

"1. The responsibility of the Deputy State Health Commissioner of the counties to the incorporated cities within that county?

"2. What is the method of appointment for Deputy State Health Commissioner in cities less than 75,000 in population?"

With reference to your first question, we direct your attention to Section 9747, R. S. Mo. 1939, which provides:

"It shall be the duty of the deputy state commissioners of health for the counties to enforce the rules and regulations of the state board of health throughout their respective counties outside of incorporated cities which maintain a health officer who has been appointed a deputy state commissioner of health as provided for in section 9745. The deputy state commissioners of health for incorporated cities of less than 75,000 population shall enforce the rules and regulations of the state board of health within their respective cities. Any deputy state commissioner of health who neglects or refuses to perform his duties as required by this article shall be deemed guilty of a misdemeanor. In case of dereliction of duty or refusal to act on the part of the deputy state commissioner of health of any county, the state board of health may at their discretion declare the office of deputy state commissioner of health for that county vacant."

Under this section the Deputy State Commissioner of Health has the duty to enforce the rules and regulations of the State Board of Health throughout the respective county of such deputy except in "incorporated cities which maintain a health officer who has been appointed a deputy state commissioner of health as provided in Section 9745." It seems clear to us, if a city does not have a deputy state commissioner of health then the Deputy State Commissioner of Health for the County not only has the power but also is required to enforce the rules and regulations of the State Board of Health in the city.

Section 9747, supra provides for the enforcement of the rules and regulations of the State Board of Health by a deputy state commissioner of health in cities of less than 75,000 population. It further refers to a deputy state commissioner of health as provided for in Section 9745, R. S. Mo. 1939. This section reads as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this law, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

It is noted that the above section provides only for a deputy state commissioner of health for counties and not for cities. Further, after a search of the sections from which this section was derived, back to 1909, when it was first found in the Laws of Missouri, we find that there never has been a provision for a deputy state commissioner of health of an incorporated city. Also, after a complete study of the statutes as of this time, we do not find any provision for the appointment of a deputy state commissioner of health for incorporated cities with less than 75,000 inhabitants.

In Meechem's, Public Officers, Section 501, it is stated that "the right to be a public officer then, or to exercise the powers and authority of a public officer, must find its source in some provision of the public law." Therefore, there would be no deputy state commissioner of health for incorporated cities below 75,000 population.

With this in mind then, under Section 9747, supra, the Deputy State Commissioner of Health for the County would also

Dr. R. M. James

(4)

have jurisdiction within the cities of his County.

Conclusion

Therefore, it is the opinion of this department that (1) the Deputy State Commissioner of Health of a County has the duty to enforce the rules and regulations of the State Board of Health throughout the County, including the incorporated cities; and (2) there is no provision in the Laws of Missouri for a Deputy State Commissioner of Health in incorporated cities of less than 75,000 inhabitants.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

INSURANCE: Articles of the Association of the Group Casualty Underwriters, Inc., a Mutual Company.



August 21, 1946

Mr. Owen Jackson
Superintendent of Insurance
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission of certified copies of the declaration on the part of the incorporators to organize a corporation for the purpose of transacting the business of insurance under the mutual plan and the corporation to be named, "Group Casualty Underwriters, Inc., a Mutual Company." This corporation is being organized under Article VII, Chapter 37, R.S. Mo., 1939. There is also transmitted a certified copy of the Articles of Association by the proposed company and the affidavit of the publication of the notice required by the statutes of this State, a copy of such notice as published being attached to and made a part of said affidavit. The opinion of this department is requested as to the compliance of such proceedings with the law.

We have examined the certified copies of these documents and proceedings. It is the opinion, therefore, of this department that such proceedings and documents comply with the laws of the State of Missouri and that such proceedings and documents are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC:ma

Insurance * Increase of stock of Transit Casualty Company of St. Louis.

August 28, 1946



Honorable Owen A. Jackson
Superintendent of Insurance of Missouri
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission to this department of certified copies of the actions of the Board of Directors and the Stockholders of the Transit Casualty Company of St. Louis, Missouri, done at meetings held respectively on June 21, 1946, and on August 22, 1946, at the home office of said company in St. Louis, Missouri, for the purpose of increasing the capital stock of said company from Two Hundred Fifty Thousand Dollars (\$250,000.00) to Five Hundred Thousand Dollars (\$500,000.00), and to amend the Articles of Incorporation of said company to conform to such increase. There are also submitted with said documents, certified copies of such proceedings, the proofs of publication of two notices, one for 10 days notice, and the other for 60 days notice, of the proposed meeting of the shareholders of said company on the the 22nd day of August 1946 to vote upon a proposition to so increase the authorized capital stock of said company, and to amend the Articles of Incorporation to conform thereto.

Your department requests the opinion of this department as to the legality of such documents and proceedings.

We have inspected the certified copies of the records submitted together with the documents accompanying them and find that such meetings were held in conformity with law, and that such proceedings comply with the insurance laws of this state and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

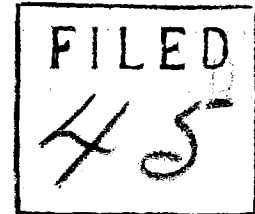
Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

GWC:msa

INSURANCE: Approval of increasing capital stock of the Missouri Insurance Co.

September 17, 1946



Hon. Owen G. Jackson
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission to this department of certified copies of the proceedings of the Board of Directors and the Stockholders of the Missouri Insurance Company increasing the capital stock of the said company from \$400,000 to \$500,000.

You request the opinion of this department as to the legality of such proceedings, which are exemplified by said certified copies of such proceedings.

We have examined these documents, and it is the opinion of this department that the proceedings of this company to increase its capital stock, as aforesaid, are all in compliance with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

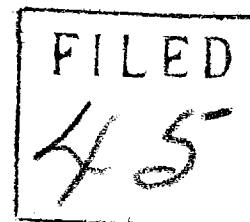
Respectfully submitted

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GAC:mg

INSURANCE: Arts. of Inc. of the Group Fire Underwriters, Inc.

September 23, 1946



Honorable Owen G. Jackson
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission to this department of certified copies of the declaration of intention to form a corporation under the laws of Missouri for the purpose of transacting the business of insurance, the Articles of Association and proof of the publication of the notice thereof of the Group Fire and Marine Underwriters, Inc., a Mutual Company, with the request of an opinion from this department if such proceedings comply with the law.

We have inspected these documents and have compared them with the requirements of the law in such cases made and provided, and find that such proceedings conform to the requirements of the insurance laws of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted

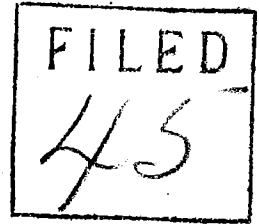
GEORGE W CROWLEY
Assistant Attorney General

GWC:ma

TAXATION:
SALES TAX:
NATIONAL BANKS:

Sales of tangible personal property to
national banks are not subject to the
Missouri retail sales tax.

October 4, 1946



10-16
Honorable W. O. Jackson
Sales Tax Supervisor
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date herein you
request an official opinion from this department as follows:

"In the Rules and Regulations relating
to the Missouri Sales Tax promulgated by
Forrest Smith, State Auditor, on Page 34,
is found Rule 12, which is in part as
follows:

"Sales of tangible personal property
or taxable services made directly to
National Banks for use or consumption by
the National Bank are exempt from the
payment of the tax levied under the
Sales Tax Act.' * * *

"Will you please advise me if this Rule
is a correct statement of the law at the
present time."

The Sales Tax Act has been in effect in this state since
1935. It has been re-enacted at each session of the General
Assembly, including the 63rd General Assembly. It was re-
enacted by the 63rd General Assembly in House Bill No. 652
which was approved on April 29, 1946. In so far as your
question is concerned, the present Act applies as did the
law when the regulation referred to in your request was
promulgated. Section 11411 of the Act provides in part as
follows:

"* * *The seller of any property or
person rendering any service, subject to
the tax imposed by this article, is
directed to collect the tax from the pur-
chaser of such property or the recipient
of the service as the case may be.* * *"

October 4, 1946

Section 11409 of the Act exempts from the provisions of the Act retail sales which the State of Missouri is prohibited from taxing under the Constitution or Laws of the United States. In the case of School District of Kansas City vs. Smith, 111 S. W. (2d) 167, 168, the court said:

"* * *The purchaser is the taxpayer, and the seller, although responsible, is the agent or conduit through which the state seeks to facilitate the accounting for and the collection of the tax.* * *"

On November 5, 1935, an opinion was rendered by the Attorney General's office, holding that the State of Missouri could not impose the sales tax on the sales of personal property, services, substances and things to national banks for use or consumption by such banks. We are assuming that the regulation referred to in your request was based upon that opinion.

The question of the authority of states to impose excise taxes upon national banks and other federal instrumentalities has been before the United States Supreme Court and state courts on a number of occasions since 1935, so in order to bring our 1935 opinion down to date, we will discuss these various cases.

The question involved in your request is whether or not the state may impose a sales tax on a federal instrumentality. National banks are instrumentalities of the United States, Owensboro National Bank vs. City of Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850. In the case of First National Bank of Guthrie Center vs. Anderson, 70 L. Ed. 295, 1. c. 302, the United States Supreme Court, in discussing the relationship of national banks to the United States, said:

"National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.* * *"

Also in the case of Maricopa County, Ariz., et al. vs. Valley National Bank of Phoenix, 318 U. S. 357, 63 S. Ct. 587, the United States Supreme Court had before it the question of the authority of the State of Arizona to collect

October 4, 1946

taxes on shares of preferred stock of a national bank owned by the Reconstruction Finance Corporation. In speaking of the authority of states to impose taxes on national banks, the court in that case said: (l. c. 588)

"* * *The authority by which the taxes in question were levied did not stem from the powers 'reserved to the States' under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.* * *

The Maricopa County opinion, supra, was rendered by the United States Supreme Court on March 1, 1943. These rulings clearly demonstrate that the United States Supreme Court has taken the position that federal instrumentalities may be taxed by the states only when Congress consents to such taxation. In other words, on account of being agencies of the sovereignty, they are impliedly exempt from taxation by the states and until Congress authorizes states to tax such agencies, they cannot be taxed.

The Act of Congress relating to taxation of national banks is found in Title 12, Section 548, U. S. C. A., and has not been amended or modified since March, 1926. This section provides in part as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.* * *

The State of Missouri imposes a tax under House Bill No. 888 of the 63rd General Assembly, approved April 23, 1946, by Section 3A thereof in the following manner:

"Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, and every other banking institution as herein defined shall be subject to an annual tax for the privilege of exercising its corporate franchises within the State of Missouri according to and measured by its net income pursuant to the provisions of this Act."

According to the authorities herein before cited, since the State of Missouri has chosen to impose a tax on national banks on the basis of their net income, then it has no authority to impose any other tax on such banks. In the case of Federal Land Bank of St. Paul vs. Bismarck Lumber Co., 314 U. S. 95, 62 S. Ct. 1, the court had before it the question of the authority of the State of North Dakota to collect a sales tax on a sale of tangible personal property made by a lumber company to a federal land bank. The bank had purchased farms under foreclosure, and the lumber purchased from the Bismarck Lumber Co. was being used by the Federal Land Bank on these farms. The Sales Tax Act of North Dakota imposes the tax on the purchaser as does the Missouri Sales Tax Act. At l. c. 5, the court, in discussing the authority of states to impose a sales tax on federal instrumentalities, said:

"The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477, 59 S. Ct. 595, 596, 83 L. Ed. 927, 120 A. L. R. 1466. It also follows that when Congress constitutionally creates a corporation through which the federal government

lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 32, 60 S. Ct. 15, 17, 84 L. Ed. 11, 124 A. L. R. 1263; *Graves v. New York ex rel. O'Keefe*, supra, 306 U. S. page 477, 59 S. Ct. page 596, 83 L. Ed. 927, 120 A. L. R. 1466.

"The federal land banks are constitutionally created, *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 41 S. Ct. 243, 68 L. Ed. 577, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.' *Federal Land Bank v. Priddy*, 295 U. S. 229, 231, 55 S. Ct. 705, 706, 79 L. Ed. 1408; *Federal Land Bank v. Gaines*, 290 U. S. 247, 254, 54 S. Ct. 168, 171, 78 L. Ed. 298. The national farm loan associations, the local co-operative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Knox National F. L. Asso. v. Phillips*, 300 U. S. 194, 202, 57 S. Ct. 418, 422, 81 L. Ed. 599, 108 A. L. R. 738; *Federal Land Bank v. Gaines*, supra, 290 U. S. page 254, 54 S. Ct. page 171, 78 L. Ed. 298.

"Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress 'to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States.* * *"

One of the most recent cases before the United States Supreme Court on the question of immunity of state or federal

instrumentalities from taxes is the case of State of New York and Saratoga Springs Commission vs. United States, 90 L. Ed. page 265. This case was decided on January 14, 1946. The question involved in that case was whether or not the State of New York, which owned Saratoga Springs and derived revenue therefrom, was subject to the federal income tax. The court in that case by majority opinion held that the state was liable for the tax. In this case, the court departed farther from the principle of immunity of states from federal taxation than it had theretofore. However, from a reading of that opinion, it will be found that the court still adheres to the principle announced in McCulloch vs. The State of Maryland, 4 Wheat. 316, 4 L. Ed. 579, to the effect that states may not tax federal instrumentalities in any manner other than that granted by Congress. In our research on this question, through the Missouri Supreme Court opinions, we find that the Missouri Supreme Court in the case of the City of Carthage vs. The First National Bank of Carthage, 71 Mo. 508, had before it the question of the authority of a political subdivision of the state to impose a license tax on a national bank. This opinion was rendered in 1880, but in our research on the question, we failed to find where it has been overruled or modified. At l. c. 509, the court, in treating the question, said:

"In the case of McCulloch v. The State of Maryland, 4 Wheat. 316, it was held that congress had the constitutional right to authorize the incorporation of banks; that a bank thus incorporated had a right to establish its offices of discount and deposit within any State, and that when so established the State could not tax it. This decision was made with reference to the question whether the State of Maryland could impose a tax on the bank of the United States, incorporated under an act of Congress of April 10, 1816. The principle therein announced, has been re-affirmed and applied to the act of congress authorizing the incorporation of National Banks, in the following cases: Van Allen v. Assessors, 3 Wall. 573; Bradley v. The People, 4 Wall. 459; Lionberger v. Rouse, 9 Wall. 468; Tappan v. The Bank, 19 Wall. 490; Heburn v. School Directors, 23 Wall. 480. In all of these cases it has been held that a State can only impose such a tax upon these national banking corporations as is authorized in the act of congress creating

October 4, 1946

them, and that said act only authorizes a tax on the shares in such bank and not upon its capital stock that such banks derive their authority to do business in the States by virtue of a United States statute which is supreme. It therefore follows, that the right of defendant to conduct its business as a banking institution is in no way dependent on a license to be obtained either from the State or any of its municipalities. * * *

All of the authorities herein before referred to, including the United States Supreme Court and the Missouri Supreme Court, conclusively hold that a state may not tax a federal instrumentality in any manner other than that authorized and provided by Congress. Since the State of Missouri has chosen to tax the shares of national banking associations on a valuation measured by the net income of the respective banking organizations, then applying the foregoing rules, it would not have authority to tax national banks in any other manner.

CONCLUSION

From the foregoing, it is the opinion of this department that the State of Missouri may not impose a tax on retail sales of tangible personal property which are sold to national banks for use and consumption by such banks.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

FILED

45

November 9, 1946

Honorable Owen G. Jackson
Superintendent of Insurance
State of Missouri
Jefferson City, Missouri

Attention: Mr. Ralph C. Lashly, Counsel

Dear Mr. Jackson:

This will acknowledge transmission to this department of certified copies of the proceedings of the Directors' and Stockholders' meetings of the Western Life Insurance Company, St. Louis, Missouri to, "increase the capital stock from Two Hundred (200) shares of par value of One Hundred (\$100.00) Dollars each, to Five Hundred (500) shares of par value of One Hundred (\$100.00) Dollars each."

Your request is for the opinion of this department as to the legality of such proceedings.

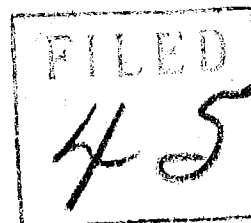
We have examined these documents and evidences of the action of the Board of Directors and Stockholders of said company, and it is the opinion of this department that the proceedings of said company to increase its capital stock, as aforesaid, are all in compliance with the laws of the State of Missouri and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Yours very truly

GEORGE W. CROWLEY
Assistant Attorney General

*Opinion
4/12*
GWC:MA

November 22, 1946



Honorable Owen G. Jackson
Superintendent of Insurance of the State
of Missouri
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission to this Department of certified copies of the amendments of articles of incorporation of the Employers Re-insurance Corporation, the proof of notice of the meeting of the stockholders of said corporation, the action of such stockholders, and the proceedings of the Board of Directors of said corporation, effecting such amendments to such articles of incorporation, with which is a request for the opinion of this Department as to the legality of such proceedings.

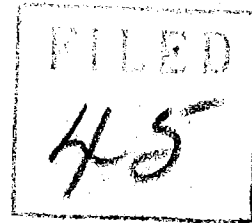
We have inspected these documents and proceedings and compared them with the requirements of law in such cases, and find that such proceedings conform to the requirements of the insurance laws of this State, and that they are not inconsistent with the Constitution of this State or the Constitution of the United States.

Respectfully submitted,

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC:ir

December 19, 1946



Honorable Owen G. Jackson
Superintendent
Division of Insurance
Jefferson City, Missouri

1719

Dear Mr. Jackson:

Your request for an opinion from this Department touching the legality of the proceedings of the Central Surety & Insurance Corporation, a Missouri Corporation, by its Board of Directors and stockholders of the company amending the Articles of Incorporation of said company, has been duly received.

Certified copies of such proceedings under the hands of the executives of said company exemplify the details of such proceedings.

We have carefully examined these documents and find that such proceedings comply with the Insurance laws of this State, and are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

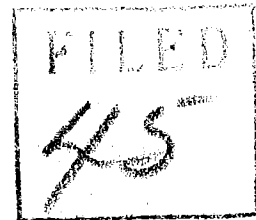
George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC:ir

#400
File copy

December 19, 1946

12/19



Honorable Owen G. Jackson
Superintendent
Division of Insurance
Jefferson City, Missouri

Dear Mr. Jackson:

This will acknowledge the transmission to this Department of certified copies of the proceedings of the Board of Directors and the stockholders of Commonwealth Life & Accident Insurance Company, St. Louis, Missouri, increasing the capital stock of said company from \$100,000.00 to \$200,000.00.

You request the opinion of this Department as to the legality of such proceedings.

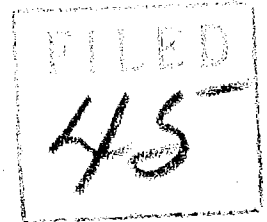
We have examined these documents, and it is the opinion of this Department that the proceedings of said company through its Board of Directors and stockholders to increase its capital stock, as evidenced by said documents, comply with the laws of the State of Missouri, and that such proceedings are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC:lr

December 21, 1946.



Honorable Owen G. Jackson,
Superintendent,
Division of Insurance,
Jefferson City, Missouri.

12/21

Attention: Hon. Ralph C. Lashly,
Counsel.

Dear Mr. Jackson:

This will acknowledge your request of December 20, 1946, for an opinion respecting the legality of the proceedings of the policyholders of the St. Louis Mutual Life Insurance Company on December 19, 1946, reorganizing said company from a mutual to a stock and mutual company.

Your request is accompanied by proof of publication of the notice by the Board of Directors of the special meeting of said policyholders for such purpose as is required by law, and also certified copies of the proceedings of the policyholders of said company reorganizing the said St. Louis Mutual Life Insurance Company from a mutual to a stock and mutual company on December 19, 1946.

We have examined these documents and the certified copies of such proceeding, and it is the opinion of this department that they come within the scope and authority of the Insurance Laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

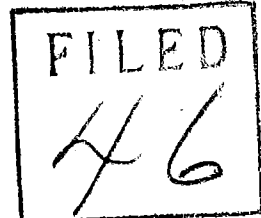
Respectfully submitted,

George W. Crowley
GEORGE W. CROWLEY
Assistant Attorney General

GWC/LD

BLIND PENSIONS: Under Constitution of 1945 probate
CONSTITUTIONAL LAW: judges may continue to perform duties
PROBATE COURTS: under the provisions of Section 9454,
R. S. Mo. 1939.

February 8, 1946



Mrs. Lee Johnston
Executive Director
Missouri Commission for the Blind
102 State Capitol Building
Jefferson City, Missouri

Dear Mrs. Johnston:

We are in receipt of your request of February 4, 1946, as to whether the judges of the probate courts of Missouri may continue to receive applications from persons desiring the benefits of Art. 1, Chap. 54, R. S. Mo. 1939, pertaining to pensions to deserving blind, as more specifically set out in Section 9454, R. S. Mo. 1939, since the adoption of the Constitution of 1945.

The jurisdiction of the probate courts of Missouri is set out in Sec. 16, of Art. V, of the Constitution of 1945, and provides as follows:

"There shall be a probate court in each county with jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and of such other matters as are provided in this Constitution."

The provision in the Missouri Statutes for the judges of the various probate courts to grant certificates to applicants for blind pensions to be certified

to the Missouri Commission for the Blind, appears under Section 9454, R. S. Mo. 1939, and this section provides as follows:

"Any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the commission for the blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact and the certificates granted by the probate judges shall be certified to the Missouri commission for the blind at its office in St. Louis, Missouri, which shall consider the merits of such application and if approved by the commission, it shall certify same to the state auditor. All pensions payable under this article shall begin on the date of the filing of the application therefor before the probate judge or the commission, as may be. And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person, at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll: Provided further, any person who shall by gifts, secret disposition, or other means dispose of any property in his or her possession in order to become wholly or in part within the provision of this article, shall be deemed guilty of a misdemeanor."

Construing the provisions of Section 9454, supra, as to whether it would come within the jurisdiction of the

probate courts as set out in Sec. 16, Art. V, Const. of Mo. 1945, it would be truly apparent that the matter of entertaining applications for blind pensions, to be certified to the Missouri Commission for the Blind, would be a matter not within the jurisdiction of the probate courts pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or leasing of lands by executors, administrators, curators and guardians, and also, it does not appear that there are any other provisions present in the Constitution of 1945 that place the subject of the matter in Section 9454, supra, within the jurisdiction of the probate courts.

However, under the provisions of Section 9454, supra, we find that the judge of the probate court in performing his duties is not functioning as the probate court, but as the probate judge.

In *Ragan v. Commission for the Blind*, 271 S. W. 1014, 1. c. 1015, the court, in construing the section from Laws of 1923, page 304, Sec. 4, which is now Section 9454, R. S. Mo. 1939, made this observation:

"It will be observed that under section 4 a person deserving to be placed on the blind pension roll may make application to either the probate judge (not the probate court) of his or her county or to the commission for the blind for a certificate. But the probate judge does not pass on the merits of the application. He only certifies to the commission whether the applicant comes within the provisions of the act, and it is the commission that 'shall consider the merits of such application,' and, if the commission approves it, the applicant's name goes on the pension roll. It is the commission which has original jurisdiction or power to consider the merits of the application and to decide whether applicant's name shall go on the pension roll. The mere fact that, when an application is made to the probate judge instead of to the commission, the latter sends in-

instructions as to how the examination shall be made, and perhaps also sends an oculist to be present at the hearing, does not take from the commission the power of jurisdiction to consider the merits of the application after the probate judge has acted; * * * * *

(Emphasis ours.)

In differentiating between the terms "court" and "judge" which are often used as synonymous, although they are entirely different, the following definitions appear in Words and Phrases, Perm. Ed. 10, 227, et seq.:

"Though the terms 'court' and 'judge' are often used as synonymous, they are entirely different; a 'court' being an organized body, with defined powers, regular times and places of meeting, and proper officers, while a 'judge' is 'a public officer appointed to preside and to administer the law in a court of justice.' City of Moline v. Chicago, B. & Q. R. Co., 104 N. E. 204, 206, 262 Ill. 52."

* * * *

"'Courts' are mere legal entities established under constitution for governmental purposes and in contemplation of law, have a separate existence from the judges who preside over them and a judge therefore has no judicial power outside of court in which he officiates and when discharging judicial function of his office, he is the court in concrete form and in such sense he is often called 'court' but strictly and technically speaking judge and court are wholly distinct. United States Life Ins. Co. v. Shattuck, 57 Ill. App. 382."

* * * *

"A "court" is not a judge, nor is a judge a "court." A judge is a public officer who, by virtue of his office, is clothed with judicial authority. A "court" is defined to be a place in which justice is judicially administered; it is the exercise of judicial power by the proper officer or officers at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction, though the "court" may not, in general, be holden independent of its officers.' Under Chinese Exclusion Act Sept. 13, 1888, Sec. 13, 25 Stat. 476, 8 U.S.C.A. Secs. 271, 282, providing that any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district, the right of appeal is to the judge as a special tribunal, and not to the District 'Court.' Chow Loy v. United States, 112 F. 354, 359, 50 C. C. A. 279."

We construe the observation of Judge Trimble, in the case of Ragan v. Commission for the Blind, supra, who pointedly asserts that under the circumstances the judge performed the duties in regard to the blind pension law as probate judge and not as the probate court, we can readily see that the probate judge performs his duties under the provisions of Section 9454, supra, as a public officer and not as the probate court, and it is a proper administrative duty placed upon the judges of the probate courts that is not dependent upon the limitations of jurisdiction as set out in Section 16, Art. V, Mo. Const. of 1945.

CONCLUSION

Therefore, it is the opinion of this department that the duties of the judges of the probate courts of Missouri,

Mrs. Lee Johnston

(6)

under the provisions of Section 9454, R. S. Mo. 1939, are not in conflict with the provisions of Section 16, Article V, Constitution of Missouri of 1945, and such functions as a judge of the probate court may perform under the provisions of Section 9454, R. S. Mo. 1939, are as a public official upon whom the legislature has placed a duty and not by virtue of the jurisdiction of the probate court which he serves as judge.

Respectfully submitted,

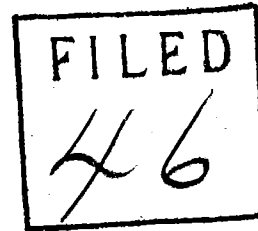
A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

April 15, 1946



4-22

Missouri Commission for the Blind
102 State Capitol Building
Jefferson City, Missouri

Attention: Mrs. Lee Johnston,
Executive Director

Gentlemen:

This will acknowledge receipt of your request for an opinion, which reads:

"Will you kindly render an opinion on the following case: an applicant for the blind pension has been receiving \$78 per month ADC for some time. For the past five months he has been employed at \$10 per week. His combined income for the past twelve months has been considerably more than \$900.00.

"Inasmuch as the law states 'That no person shall be entitled for a pension under this article who has an income, or is the recipient, of Nine Hundred Dollars (\$900.00), or more per annum from any source whatever'. Would this render this applicant ineligible to receive a blind pension?

"Our understanding of an ADC grant is that is for the use of the children for whom it is given. Should this be considered as an income for the applicant, or as an income for his children."

We assume, for the purpose of this opinion, that if this applicant was not receiving the \$78.00 per month as aid for dependent children that he would qualify for a blind pension since he would not be the recipient of income in the amount of \$900.00 from any source whatever.

Section 9451, pages 786-7, Laws of Missouri, 1943, reads in part:

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of nine hundred (\$900.00) dollars or more per annum from any source whatever,
* * *"

Section 9408, page 645, Laws of Missouri, 1941, provides who shall be entitled to receive benefits under said act for aid to dependent children. Subsection (2) thereof reads as follows:

"(2) Has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with, father, mother grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother,

stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home;"

Section 9417, page 647, Laws of Missouri, 1941, specifies who shall receive such benefits, and reads in part:

"Benefits hereunder shall be delivered to the applicant in person or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. * * *"

In view of the foregoing provisions, there certainly can be no question but that the aid for dependent children referred to in the Social Security Act is primarily for the purpose of the children qualifying for same and is merely paid to the relative with whom said children are living for the benefit of said children, and cannot be considered as income or money received by the applicant for a blind pension as the word "income" is ordinarily construed under the law.

There is a well-established rule of statutory construction that a statute should not be construed so as to make it unreasonable where it can be given a reasonable construction and that it should receive a sensible construction such as will effectuate legislative intention, if possible, so as to avoid an unreasonable or an absurd conclusion. (See *State ex rel. St. Louis Public Service Co., v. Public Service Commission*, 34 S. W. (2d) 486, 326 Mo. 1169; also see *Chrisman v. Terminal Railroad Ass'n.*, 157 S. W. (2d) 230, 237 Mo. App. 181.)

48 C. J., Section 4, page 787, states the following principle regarding pension laws:

"While it has been held that a statute making it a criminal offense to violate a pension law must receive strict construction, it has been uniformly held that laws creating the right to pensions must be liberally construed with the view of promoting the objects of the lawmaking body; and their force and

effect are not to be conformed to the literal terms of the statute."

In *Dahlin v. Missouri Commission for the Blind*, 262 S. W. 420, the Springfield Court of Appeals in construing the blind pension law held that it is remedial and should be liberally construed and also construed with the object in view that was sought to be accomplished, and in so holding said (1, c. 424):

"The blind pension law is remedial, and should therefore be liberally construed; also it should be construed with the object in view that was sought to be accomplished. *Straughan v. Meyers*, 268 Mo. 580, 187 S. W. 1159; *Lusk v. Public Service Com.*, 277 Mo. 264, 210 S. W. 72.

"Where certain terms of a statute are ambiguous, resort may be had to its title as a clue or a guide to its meaning. *Straughan v. Meyers*, supra. Looking to the title of both the act of 1921 and the act of 1923, we find that the purpose was to provide pensions for the deserving blind.

"Guided by these rules of construction, we do not think that the Legislature intended to exclude from the blind pension those who can merely distinguish between light and darkness, or motion, or the direction of motion, and no more. 'Light perception,' as used in the act, we construe to mean all that field or scope of vision from the mere ability to distinguish between light and darkness up to the ability to discern form; that is, when one is able to recognize the form of an object, such person has a greater vision than light perception. Such is the scope of light perception as defined by Dr. Schmidtman and Hansel & Sweet, quoted supra, and also by part of the specialists who testified

at the trial in the circuit court. Most of the specialists, however, as above stated, who were before the circuit court, seem to have considered that light perception should be confined to the lowest degree of vision--that is, the mere ability to distinguish between light and darkness--and that any greater vision would be greater than light perception. We do not believe that the Legislature intended such a restricted and limited scope. Such a restricted and limited construction would, for all practical purposes, render ineligible all those except the totally blind."

Conclusion

Therefore, it is the opinion of this department that the benefits under the Aid for Dependent Children Program that this applicant is receiving, is not income, to him, as the word is used in Section 9451, supra, but that said applicant is merely acting as trustee for the children who are recipients of said benefits under the Social Security Act, and therefore such benefits as he is receiving under the Social Security Act should not be taken into consideration in determining his qualifications for a blind pension.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. H. TAYLOR
Attorney General

BLIND PENSION: In Re: Maintenance costs granted applicant for blind pension while attending school under the rehabilitation program does not constitute income or money received from any source as provided in Section 9451, R. S. Mo., 1939.

April 17, 1946



Missouri Commission for the Blind
Jefferson City, Missouri

Attention: Mrs. Lee Johnston, Executive Director.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion, which letter reads as follows:

"In taking into consideration eligibility for a blind pension, the law grants an income of \$900.00 from any source.

"We have a case of a young man who is a student at the University of Missouri under our Vocational Rehabilitation Department for whom we are paying maintenance. Should the amount of maintenance which has been paid for him in the last twelve months be taken into consideration in checking up on his income for eligibility? As this may come up in other cases, we would like to have your opinion."

Section 9451, Page 786, Laws Missouri 1943, provides, in part, that no person shall be eligible for a blind pension who has income or is the recipient of \$900.00 or more per annum from any source whatsoever, and reads:

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient of nine hundred (\$900.00) dollars or more per annum from any source whatever, * * *"

Under Section 9447, R. S. Mo. 1939, the Missouri Blind Commission is authorized to make expenditures for rehabilitation of certain persons and pay the temporary costs of food, raiment and shelter. Said statute reads:

"The duties of said commission shall be to prepare and maintain a complete register of the blind persons within this state and to collate information concerning their physical condition, cause of blindness and such additional information as may be useful to the commission in the performance of its other duties as herein enumerated, and to investigate and report to the general assembly from time to time the condition of the blind within this state, with its recommendations concerning the best method of relief for the blind; to adopt such measures as the commission may deem expedient for the prevention and cure of blindness; to establish and maintain at such places within this state as the commission may deem expedient shops and workrooms for the employment of blind persons capable of useful labor, and to provide superintendence and other assistance therefor and instruction therein; to compensate the persons so employed in the manner and to the extent that the commission shall deem proper; to provide such means for the sale of the products of the blind as the commission shall deem expedient; to act as a bureau of information for the purpose of securing employment for the blind of this state elsewhere than in the shops and workrooms of the commission, and to this end the commission is authorized to procure and furnish materials and tools and to furnish aid and assistance to blind persons engaged in home industries and to buy and sell the products of the blind wherever and however produced within this state; to provide for the temporary cost of the food, raiment and shelter of deserving blind persons engaged in useful labor; to ameliorate the condition of the blind by such means consistent with the provisions of this article as the commission may deem expedient: Provided, however, that no part of the funds appropriated by the state shall be used for solely charitable purposes; the object and purpose of this article being to encourage capable blind persons in the pursuit of useful labor and to provide for the prevention and cure of blindness."

Furthermore, Section 9453, R. S. Mo. 1939, indicates that Article I, Chapter 54, R. S. Mo. 1939, shall not be construed to grant benefits to anyone physically or mentally capable of receiving vocational training, who refuses for any reason to avail himself of such training, and further authorizes said Commission to admit said applicant to the pension roll if otherwise qualified and he signifies his willingness and readiness to enter upon such course. Said section reads:

"This article shall not be so construed as to grant the benefits thereof to any blind person between the ages of twenty-one (21) and fifty (50) years who has no occupation and who, being both physically and mentally capable of some useful occupation or of receiving vocational or other training, who refuses, for any reason, to engage in such useful occupation or to avail himself or herself of such vocational or other training: Provided, that the commission is hereby empowered to grant its certificate admitting to the pension roll any applicant, otherwise qualified for a pension who signifies his or her willingness and readiness to enter upon a course of vocational or other training; but in the event any such person fails for more than a reasonable time to enter upon such course of training, without good cause, upon recommendation of the commission the state auditor shall strike the name of such person from the blind pension roll."

Therefore, in view of the foregoing statutory provisions, unquestionably the Missouri Commission for the Blind is authorized to furnish such training if there is an appropriation for such expenditure.

In House Bill 270, section 3, page 11, we find the 63rd General Assembly appropriated funds for the Commission for the Blind for the period beginning July 1, 1945, and ending June 30, 1946. Said appropriation includes funds for administration of the blind pension, personal service, operation, rehabilitation and prevention of blindness. Apparently the 63rd General Assembly was of the opinion that the Commission for the Blind was authorized to carry out the rehabilitation program provided for in the foregoing statutes and appropriated funds for carrying out such program. Furthermore, the 78th Congress of the United States enacted Public Law 113 which provides for participation in the payment of maintenance costs under the rehabilitation program during certain training periods upon the state meeting certain federal requirements. Said act, in part, reads:

"Sec. 3. (a) From the sums made available pursuant to section 2, the Secretary of the Treasury shall pay to each State which has an approved plan for vocational rehabilitation, for each quarter or other shorter payment period prescribed by the Administrator, the sum of amounts he determined to be--

* * * *

"(3) one-half of necessary expenditures under such plan in such period (exclusive of administrative expense) for rehabilitation services specified in subparagraphs (A), (B), (C), (D), and (E), to disabled individuals (not including war disabled civilians) found to require financial assistance with respect thereto, after full consideration of the eligibility of such individual for any similar benefit by way of pension, compensation, or insurance, such rehabilitation services being--

* * * *

"(E) maintenance not exceeding the estimated cost of subsistence during training including the cost of any necessary books and other training material."

* * * *

Such payments should not be considered as income on money received by the applicant from any source whatsoever for the reason that all the statutes, both state and federal, clearly indicate that for such applicant to qualify for a blind pension, if he is mentally and physically able, he must attend such school of training and, furthermore, the state and federal government have provided for maintenance costs while attending such school of training. All of which indicates that both Congress and the Legislature of the State of Missouri fully intended that such appropriation for maintenance costs during a training period should be in addition to their blind pension and not be considered as income. If it were so considered it might work a grave injustice and in many instances prevent persons otherwise eligible from qualifying for a blind pension. As often cited, both in the decisions and opinions rendered by this department, the blind pension law is remedial and should be liberally construed with the object in view that was sought to be accomplished. In *Dahlin v. Missouri Commission of the Blind*, 262 S. W. 420, 1.c. 424, the Court after announcing the foregoing rules of construction said:

"(11) Guided by these rules of construction, we do not think that the Legislature intended to exclude from the blind pension those who can merely distinguish between light and darkness, or motion, or the direction of motion, and no more. 'Light perception,' as used in the act, we construe to mean all that field or scope of vision from the mere ability to distinguish between light and darkness up to the ability to discern form; that is, when one is able to recognize the form of an object, such person has a greater vision than light perception. Such is the scope of light perception as defined by Dr. Schmidtman and Hansel & Sweet, quoted supra, and also by part of the specialists who testified at the trial in the circuit court. Most of the specialists, however, as above stated, who were before the circuit court, seem to have considered that light perception should be confined to the lowest degree of vision--that is, the mere ability to distinguish between light and darkness--and that any greater vision would be greater than light perception. We do not believe that the Legislature intended such a restricted and limited scope. Such a restricted and limited construction would, for all practical purposes, render ineligible all those except the totally blind."

Furthermore, we understand that such maintenance afforded applicants by the state and federal government is not paid directly to the applicant and student but to the person with whom he is boarding. Apparently a contract is entered into by the Missouri Commission for the Blind with the operator of the boarding house where said applicant resides.

CONCLUSION

Therefore, it is the opinion of this department that the money paid by the state and federal government for maintenance of an

applicant for a blind pension during the period of training under the rehabilitation program should not be considered as income or money received by the applicant as provided under Section 9451, R. S. Mo. 1939.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:mw

BARBER BOARD: Barber with revoked license may apply for renewal within 90 days of revocation.



June 5, 1946

6/14

Mr. J. E. Johnston, President
State Board of Barber Examiners
#1 West Linwood Boulevard
Kansas City 2, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"I am writing you of a case involving the Barber Board and two barbers: Jasper Bruner and Charles Avery. These men's Barber Licenses were revoked in 1943 by the former Board. They obtained an injunction against the Board at that time, refraining the Board from molesting them in any way. This restraining order held until January 7th of this year, when it was dissolved. These men continued working at the Barber trade until about April 25th, when they were notified by the Prosecutor's Office that if they did not cease working, they would be arrested. They were also instructed that they must appear before the Board and have their case reheard before they could obtain a license.

"There are two primary points involved:
1. Under the law, if a man's license lapses for two years, he must appear before the Board and make a passing grade on the Examination before a license can be issued to him.

"2. Under the law, if a man's license is revoked, he must cease working and cannot

have his case reheard under a period of ninety days.

"In your opinion, would these men be eligible to ask for a rehearing of their case immediately, or should they wait ninety days from the time that they ceased working, and would the Board be justified in making them take the Examination and making a passing grade before issuing their licenses?"

Replying thereto, it is noted that you state their licenses were revoked in 1943. Your letter further states: "They obtained an injunction against the Board at that time, restraining the Board from molesting them in any way. This restraining order held until January 7th of this year, when it was dissolved." You do not state the details of the court proceedings wherein the restraining order was issued, nor do you state the alleged grounds of same.

If the restraining order had been issued while the proceedings of the Board were being had to revoke the licenses, it would have had the effect of preventing the Board from taking further action toward revoking and from revoking said licenses until after the restraining order was dissolved. However, absent specific detailed information of the court proceedings, we take at face value your statement that "These men's Barber Licenses were revoked in 1943 by the former Board." If so, then the certificates have been revoked more than ninety days.

Section 10137, R.S. Mo. 1939, provides as follows:

"Said board shall have power to revoke any certificate of registration or permit granted by it under this chapter for conviction of crime, habitual drunkenness, gross incompetency, failure or refusal to properly provide or guard against contagious or infectious disease, or the spreading thereof, in the practice of the occupation aforesaid, or violation of the rules of the board mentioned in section 10128 of this chapter, or for any extortion or overcharge practiced: Provided, that before

Mr. J. W. Johnston, President -3-

any certificate or permit mentioned in this chapter shall be so revoked, the holder thereof shall have notice, in writing, of the charge or charges against him, and shall, at the day specified in said notice, at least five days after the service thereof, be given a public hearing on said charges and full opportunity to produce testimony in his behalf and to confront the witnesses against him. Any person, firm or corporation whose certificate or permit has been so revoked may, after the expiration of ninety days, apply to have same reissued upon a satisfactory showing that the disqualification has ceased."

It will be observed that the above statute provides that "Any person, * * * * whose certificate or permit has been so revoked may, after the expiration of ninety days, apply to have same reissued upon a satisfactory showing that the disqualification has ceased."

The words "so revoked" in said statute refer to the preceding part of said section which specifies the grounds on which licenses may be revoked, the procedure therefor, including written notice thereof of not less than five days, public hearing, full opportunity to produce testimony in the applicant's behalf and to confront the witnesses against him.

The fact that the two men you mention continued working at the barber trade without a license and after the licenses had been revoked, and that they so worked until April 25, 1946, will not in itself be a valid reason for denying their application to have their licenses reissued until "after the expiration of ninety days" from the time they actually ceased their labors as barbers. They may have been violating the law when they continued barbering after revocation of their licenses, but the above statute does not say that that is a reason why they cannot apply for a reissuance of their licenses.

The court proceedings you mention, including the restraining order which was operative from just after the revocation in 1945 of the licenses until January 7, 1946, have no bearing on the right of said two men to apply for reissuance of their

Mr. J. E. Johnston, President -4-

licenses. The statute fixes the beginning of the ninety day period as the date their licenses were revoked, and you say that was in 1943.

Section 10132, R.S. Mo. 1939, provides:

" * * * * any barber failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications to practice said occupation and shall pay to the treasurer of said board the regular examination fee * * * *"

As the licenses here considered were revoked in 1943, more than two years have elapsed and the Board should, before issuing or renewing said licenses, require examination and satisfactory showing as called for in the above Section 10132.

Conclusion.

It is our opinion that a barber whose license was revoked in 1943 under the provisions of Section 10137, R.S. Mo. 1939, and who thereafter procured a restraining order against molestation by the Barber Board, which order was dissolved January 7, 1946, and who worked in said barber trade until about April 25, 1946, and who desires to make application to have his license reissued, is entitled at this time to make such application, and before issuing or renewing said licenses, the Board should require examination and satisfactory showing.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

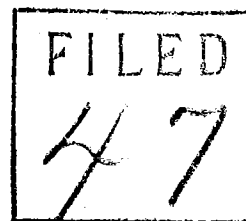
J. E. TAYLOR
Attorney General

DW:ml

OFFICERS: Vacancy in office of county surveyor would

VACANCIES: be filled by appointment by the Governor.

February 7, 1946



2-14

Honorable O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

Receipt is acknowledged of your recent request for an opinion, reading as follows:

"I fail to find the definite provisions for filling of vacancy in Office of County Surveyor.

"Please advise me the method for filling the office of County Surveyor, in the event a vacancy occurs by resignation of the present County Surveyor.

"I conclude that it would be by appointment by the Governor, under the provisions that when vacancy occurs in any elective office, not provided for otherwise, the vacancy would be filled by appointment by the Governor. However, I would like to have an opinion from your office on this question."

Chapter 90, R. S. Mo. 1939, pertains to county surveyors and provides for their election, term of office, duties, etc. However, nowhere in this chapter is there provided the method of filling the office of county surveyor when a vacancy is created by resignation of the incumbent.

Section 4 of Article IV, Constitution of 1945, invests the Governor with the power to fill vacancies in public offices

unless otherwise provided by law, and is as follows:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

Section 11509, R. S. Mo. 1939, pertains to filling vacancies in state and county offices by appointment by the Governor, and provides as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

We note that the office of county surveyor is not included among the offices specifically named in the above section which are excepted from being filled by appointment by the Governor when a vacancy occurs. Consequently, the office of county

surveyor, being an elective county office, would be filled by appointment by the Governor in case a vacancy occurred.

Under Section 11509, supra, the person appointed to fill a vacancy occurring in the office of county surveyor would continue in such office until after the next ensuing general election, which might be before the remaining term of the county surveyor was to expire. The person elected at the next ensuing general election would then fill out the remaining term. If the next ensuing general election was the one to elect a county surveyor for the next ensuing regular term, then the person elected to such office would continue in office for the next regular term. The person appointed to fill the vacancy would hold the office until the date that the person elected at the next ensuing general election entered upon the discharge of his duties.

In State ex inf. Barrett ex rel. Shumard v. McClure, 253 S. W. 743, 299 Mo. 688, the principal question involved was whether the person appointed by the Governor to fill the office of county treasurer after a vacancy had occurred, due to the incumbent dying, could, under the appointment, hold the office for the remainder of the unexpired term. Another person was claiming the office as a result of a general election held before the term expired. At S. W. loc. cit. 744, the court stated that:

" * * * * Section 4786 provides for the appointment to fill a vacancy caused by whatsoever means in a county office to be filled 'until the first Monday in January next following the * * * ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be.' The section then provides that, when the term begins on any other day than the first Monday in January, the appointee shall hold such office until such other date.

"The statute plainly states that the election may be for an unexpired term. The Governor would have no authority to make an appointment which would conflict with that provision of the statute. This question was settled by the court en banc

in case of State ex inf. v. Koeln,
270 Mo. 174, loc. cit. 190, 191, 192
S. W. 748, which involved the office
of collector. A collector's office
ran for four years under section 12875,
R. S. 1919; the provision being in
language very similar to section 9528,
relating to the term of county treasurer.
This court there held that at a general
election the collector could be elected
for an unexpired term; that there was no
conflict between the statute regulating
the length of the term and section 4786,
R. S. 1919, providing for an election for
the unexpired term. * * * *

Conclusion.

Therefore, in view of the foregoing, it is the opinion
of this department that a vacancy created in the office of
county surveyor, by resignation of the incumbent, would be
filled by appointment by the Governor, under the authority
of Section 4, Article IV, Constitution of Missouri 1945, and
Section 11509, R. S. Mo. 1939. The person appointed to fill
such vacancy would continue in office until the person elected
to fill such office at the next ensuing general election would
enter upon the discharge of the duties of the office.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

21 Mr. John
SCHOOLS: Consolidated school district to maintain action against directors of component districts to recover property of such districts.

August 27, 1946



Hon. A. A. Kamp
Prosecuting Attorney
Montgomery City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion which reads as follows:

"I am writing you for an opinion regarding the moneys and property belonging to rural districts which have been heretofore consolidated with a town district. In May, 1946, the Bellflower school district was consolidated with a number of rural districts into what is known as Bellflower Consolidated School District No. 1.

Section 10498 R. S. 1939 provides that the school officers of the former school districts included in the new consolidated district shall, on or before June 30, turn over to the officers of the new district all property, money, books, papers, etc.

A part of the rural districts have by warrants transferred the money belonging to their districts to the new consolidated district. However, some of the districts have refused to do this.

The question on which I would like your opinion is: What procedure should be taken to compel the old districts to transfer the money in the county treasury to the new consolidated district? Also, what procedure for the new consolidated district to obtain possession and control of the school buildings and desks and property therein, which under the above quoted section are the property of the new consolidated district?

Is there any provision under the law for the County Court to order the Treasurer to transfer the money to the consolidated district?"

In answer to the last question you asked, we find no provision of law which would authorize the County Court to order the County Treasurer to transfer the money of the former districts to the consolidated district.

The legislature has power to provide for consolidation of school districts. In *State Ex Rel. vs. Smith*, 343 Mo. 288, 121 S.W. 2d, 160, 161, the Court said:

"It has long been the rule in this state, and generally throughout the country, that the power of the legislature in the creation of public corporations (which term includes school districts) is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands."

There is no question of the right of the legislature to direct what disposition shall be made of school money and property of the various districts when they are consolidated into one district. School money and property are public property and do not belong to the individual districts. In the case of *School District of Oakland vs. School District of Joplin*, 340 Mo. 779, 102 S.W. 2d 909, 910, the Supreme Court, in discussing the status of school money and property, said:

"Section 1 of article 11 of the Constitution of Missouri (15 Mo. St. Ann. p. 810) provides: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years.' The General Assembly, by statutory enactment, has provided for the establishment of units, designated 'school districts,' their organization, and vested said districts with certain powers and duties (chapter 57, R.S. 1929, P. 9194 et seq., Mo. St. Ann. P. 9194 et seq., p. 7066 et seq.) to facilitate its effectual discharge of this constitutional mandate. The school districts are organized as separate legal entities. *School Dist. No. 7 v. School Dist. of St. Joseph*, 184 Mo. 140, 156, 82 S.W. 1082, 1086. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of

imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. * * * * They are supported by revenues derived from taxes collected within their respective territorial jurisdictions and the general revenues of the state collected from all parts of the state. These taxes and such property as they may be converted into occupy the legal status of public property and are not the private property of the school district by which they may be held or in which they may be located."

Since the money and property in the hands of a school district are public property, they are subject to regulation by the legislature for the best interests of the public. School districts and officers are merely trustees charged with handling said funds according to law. The terms of their trust are the statutes of the state.

The state has provided for the consolidation of common school districts by Section 10493 R.S. Mo: 1939, et. seq. and by Section 10498, has provided for the disposition of the moneys and property of the component districts. Said Section 10498 reads as follows:

"Whenever any consolidated district is organized under the provisions of this article, the original districts shall continue until June 30th, following the organization of said consolidated district, and at that time all the property, money on hand, books and papers of the school districts whose schoolhouse sites are included within said consolidated district shall by the officers of aforesaid districts be turned over to the board of directors of the consolidated district, and also all bonds outstanding against the aforesaid districts shall become debts against the consolidated district. The division of property and money on hand in case school districts are divided by the formation of any consolidated district shall be governed by sections 10413 and 10414."

Under the above section it was the plain duty of the directors of the various component districts to transfer and surrender to the consolidated district all of the property, money on hand, books and papers of said component districts, on June 30, 1946. From your letter it appears, however, that some of the districts refused to make such transfer and assignment of property. We, therefore, have a situation where persons charged with a specific duty refuse to perform

that duty. The officers of the component districts you mentioned had the specific duty of transferring all of the money and property in the hands of their respective districts to the consolidated district on June 30, 1946. The consolidated district, under Section 10498 became entitled to all the moneys and property of the former districts. In *State ex rel vs. Smith*, supra, the Court, in speaking of the right of a consolidated district to such moneys and property, said, 121, S.W. 2d, 1.c. 163:

"Upon consolidation the identities of the component districts fade and disappear completely and in their stead emerges a new entity in the form of the consolidated district. This new entity spontaneously becomes the owner of the properties and liable for the old debts."

The consolidated district would have been entitled to such money and property even without Section 10498. In *Cleveland Village School Dist. vs. Zion*, 195 Mo. App. 190 S. W. 958, the Court said:

"It may perhaps very well be that, if the Cleveland Village school district had absorbed all of the Glen Wild district, then the former would be entitled to sue for and recover the property belonging to the latter, as successor to all its rights and liabilities. *Abler v. School District of St. Joseph*, 141 Mo. App. 189, 197, 124 S.W. 564. As said in *District v. District*, 18 Mo. App. 272: 'Where a corporation goes entirely out of existence, by annexation to or merger in another corporation, if no arrangement be made respecting the property and liabilities of the defunct corporation, the subsisting corporation succeeds to all the property and liabilities of the former. This rests on the principle of succession of rights and devolution of obligations!'"

So there seems to be no question but that Bellflower Consolidated School District No. 1, mentioned in your letter, is now entitled to maintain legal action to recover the moneys and property formerly in possession of the common school districts of which it was formed. The question is to what the correct legal action is for the consolidated district.

It has been repeatedly held that mandamus is a proper remedy to compel public officers to perform their duties. In the case of *Bakersfield News vs. Ozark County*, 338 Mo. 519, 92 S.W. 2d 603, 605, the Court said:

"If a public officer fails to perform mandatory ministerial duties, he may be compelled to do so by mandamus."

Of course, only clear ministerial duties of an officer can be enforced by mandamus. In *State ex rel vs. Meier*, 143 Mo. 439, 446, the Court said:

"That the respondent as president of the council is a person charged with the exercise of legislative power is evident, and that the courts will not interfere with either of the other co-ordinate departments of the government in the exercise of their powers, except to enforce mere ministerial acts required by law to be performed by some officer thereof, as to the performance of which the law leaves the officer no discretion, is the well settled law of the land, universally recognized since the decision in Marbury v. Madison, 1 Cranch, 64, in which MARSHALL, Chief Justice, speaking for the Supreme Court of the United States declared the rule, that whether mandamus would lie or not is to be determined 'not by the office of the person to whom the writ is directed, but by the nature of the thing to be done.'"

In the latter case the Court defined ministerial duties as follows; l.c. 447:

"A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." Merrill on Mandamus, sec. 30; Marcum v. Com'rs, 42 W. Va. 263, and cases cited."

In the situation presented in your letter the directors of the common school districts are left no discretion by the law with regard to disposing of the money and properties in their charge. The legislature has decreed what shall be done with such money and property under the given circumstances and the directors have nothing to say as to what should be done in the premises. Under the plain wording of the statute they have one ministerial act to perform and that is to turn over to the consolidated district all moneys and property in their charge as directors.

It is also true that mandamus will not usually be issued where there are adequate remedies at law (State ex rel vs. Bourke, 338 Mo. 86, 89 S. W. 2d, 31). However, in the case you mentioned, the consolidated school district does not have an adequate remedy at law to obtain the money which is in the County Treasury to the credit of the former common school districts. Section 10400, R. S. Mo. 1939, provides in part as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter * * *"

It will be seen that by the foregoing statute, the County Treasurer is obliged to hold said moneys until warrants are duly issued by the directors of the respective districts. No one is given the right to draw warrants on these school district funds except the directors of the respective school districts. For that reason, there is no remedy at law by which the consolidated district can obtain possession of these funds. While it is true that under Section 10498 of the statutes common school districts passed out of existence on June 30, 1946, yet since the directors have not performed their duty, it would seem that they still have a trust to perform and could, therefore, be compelled by mandamus to draw warrants in favor of the consolidated district.

It may be that as to the other personal property and the real estate of the former school districts the consolidated district has adequate remedies at law. It could maintain ejectment to recover possession of the real estate and could maintain replevin to recover possession of other tangible personal property. For that reason, the Courts might refuse to issue mandamus against the directors to compel them to turn over the real estate and tangible personal property. However, under Section 37 of the Civil Code of Missouri (Laws 1943, p. 370) the mandamus action, the replevin action and the ejectment suit could likely all be joined in one action.

Said Section 37 reads as follows:

"The plaintiff in his petition or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims where there are multiple parties if the requirements of sections 15, 16, and 18 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of section 77 and section 20, respectively, are satisfied."

CONCLUSION

It is therefore, the opinion of this office that where common school districts have been legally incorporated into a consolidated district but their officers refuse to turn over to the consolidated district the moneys and property in the hands of said component districts, the consolidated district can maintain a mandamus action against the officers of the former districts to compel them to draw warrants in favor of the consolidated district for the funds in the County Treasury to the credit of their respective common school districts, and can also maintain replevin action to recover tangible personal property of the former common school districts and ejectment action to recover possession of the real estate formerly used by the common school districts. Under Section 37 of the Civil Code of Missouri (Laws 1943, p. 370) all of said actions could be joined in one suit.

Yours very truly,

HARRY H. KAY
ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

CONSTABLES: The office of constable will be abolished as of January 1, 1947, or at the expiration of the term of the present constable if after January 1, 1947.

9/24/46



Mr. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the following facts:

"There seems to be some uncertainty regarding the Office of Township Constables, under the new Constitution.

"The County Clerk asked me to write your office for an opinion on this matter, so he will know whether there should be any provisions for election of constables on the ballots in the coming election. He informs me that there were some names written in for nomination at the Primary Election, and he is not certain about the matter.

"It is plain that the office of Justice of Peace is eliminated, but I have failed to find where the office of Constable is done away with.

"Please write me your opinion at your very earliest opportunity, as to the office of constable.

"I assume that since all duties are taken away from the Constable that they are eliminated, however I do not have the law on this matter to make same clear."

Without quoting, Sections 13370 to 13381, inclusive, R.S. Mo. 1939, as amended, establish and define the office of

constable. These sections contain the provisions under which the office of constable has heretofore operated.

Section 1 of Senate Bill No. 361 repeals all of the above sections of the statutes, and is as follows:

"That Sections 13370 as amended by an act of the 61st General Assembly, approved August 2, 1941, appearing in Laws of Missouri, 1941, at page 325, and as further amended by an act of the 61st General Assembly, approved August 2, 1941, appearing in Laws of Missouri, 1941, at page 326, and Sections 13371 to 13381, both inclusive, the same being all of Chapter 97 of the Revised Statutes of Missouri, 1939, entitled 'Constables', be and the same are hereby repealed."

Section 2 of Senate Bill No. 361 provides the effective date, and is as follows:

"This act shall become effective on January 1, 1947 except that in counties in which the present terms of constables end after January 1, 1947, this act shall take effect at the expiration of the present terms of constables in said counties."

As can be readily seen, the present constables will hold their office until January 1, 1947, or until the expiration of their term if the same is after January 1, 1947.

The powers and duties exercised by the constables before the sections establishing that office were repealed will be exercised by the sheriff after the expiration of the term of office of the present constable, as provided for in Section 1 of Senate Bill No. 362, which is as follows:

"Whenever the word 'constable' appears in any statute, except insofar as any such statute applies to the City of St. Louis and to counties of the first class, the same shall hereafter be deemed to refer exclusively to and to mean 'sheriff' unless such construction is plainly repugnant to the context of any such statute."

Mr. O. A. Kamp

-3-

Section 2 of Senate Bill No. 362 establishes the effective date of the act, which date is the same as that provided for in Senate Bill No. 361.

Conclusion.

It is the opinion of this department that the office of constable will be abolished in counties of the second, third and fourth class as of January 1, 1947, or at the expiration of the present term of the constable if same is after January 1, 1947, and therefore it will not be necessary to include the office of constable upon the ballot in the coming election.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

TIME: County officers of Iron County to operate on CST.

May 2, 1946



Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"The City of Ironton has provided by ordinance for daylight saving time.

"The County Court House is in Ironton, and should the county officers office hours conform to the City time or standard time?"

The State of Missouri has no statutory enactment which establishes any particular clock-setting as the official time of the state. However, the time zone as established by the Federal government has been generally adopted throughout the state and has been in use for many years. The zone in which this state is located is the Central Standard Time zone, and, therefore, that is the time which is in general use in this state.

In determining whether Standard Time or Daylight Savings Time is applicable, the courts look to see which of the two is generally in use. As an example of such determination we quote from the case of Anderson v. Cook, 130 P. (2d) 278, 143 A. L. R. 987, wherein it is stated, l. c. 991:

"The case of Salt Lake City v. Robinson, 39 Utah 260, 116 P. 442, 446, 35 LRA (NS) 610, Ann Cas 1913E, 61, is determinative of this question. In that case

it was said: '... When, therefore, the system is and has been in universal use, as in Salt Lake City or as in New York City, as illustrated in the case of Globe, etc., Ins. Co. v. David Moffat Co., supra (2 Cir, 154 F 13), the courts not only may, but should, take judicial notice of that fact; and when time is a material ingredient, at least so far as laws are concerned, courts should apply the time in general use, and not that which by common consent has been discarded and has thus become obsolete.'

"So here, when not only the State of Utah but practically the entire nation entered upon and put into use what we call War Time, and practically all business, public and private, including schools, transportation systems, banks, stores, mail service, etc., operate upon such schedule, it becomes the time in general use, the standard time on which business operates and regulates political as well as social and economic life. Here too, the court having, prior to this statute, laid down the rule for construction of time statutes, it must follow that had the legislature intended some other basis of computation it would have so specified. * * *"

In an annotation to the case of State of Wisconsin v. Badolati, 143 A. L. R. 1234, at page 1241, the general rule is stated as follows:

"The criterion used by the courts generally, at least in the absence of a specifically applicable statutory enactment setting a standard of time, to determine which of two systems or measures of time is applicable to a specific time provision, is whether any particular system is in general use.
* * *"

In arriving at this general rule, the following cases were cited: Jones v. Gorman Ins. Co., 110 Ia. 75, 81 N. W. 188; State v. Johnson, 74 Minn. 381, 77 N. W. 293; Soarles v. Avenhoff, 28 Neb. 668, 44 N. W. 372; McFarlane v. Whitney, 134 Tex. 394, 134 S. W. (2d) 1047; Salt Lake City v. Robinson, 39 Utah 260, 116 P. 442.

In line with this general rule, we may look to determine which particular system is in general use in your community. You state in your request that the City of Ironton has adopted an ordinance providing Daylight Savings Time for that city.

As stated hereinbefore the State of Missouri follows Central Standard Time, and under the rule followed by the courts that is the system in general use in this state, excluding a few isolated cases.

The population of the city of Ironton by the 1940 Census was 1,083. The population of Iron County by the same Census was 10,440. We do not believe that it may be said, therefore, that more than one-tenth of the population of Iron County is affected by Daylight Savings Time. The county officers are to give service to the entire population of the county and not alone to those who reside in the city of Ironton. In order to give their service properly these officers should operate on the time in general use in the entire county.

Conclusion

It is, therefore, the opinion of this department that the officers of Iron County should conform to Central Standard Time, since that is the particular system which is in general use in that county.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COUNTY CLERKS:.

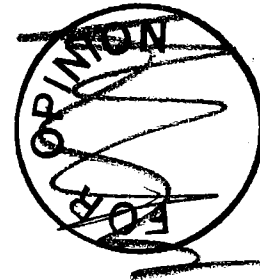
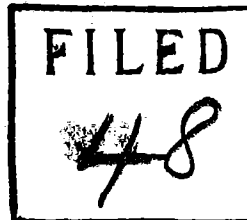
CONSTITUTIONAL LAW:

CONSERVATION COMMISSION:

County Clerks may continue to receive fees as agents for the Conservation Commission in the sale of hunting and fishing licenses.

June 12, 1946

Honorable Edgar J. Keating
Missouri Senate
63rd General Assembly
Jefferson City, Missouri



Dear Senator Keating:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department:

"As to whether the County Clerk (in counties of the first class) may receive not only the statutory salary as county clerk, but also continue to receive fees as agent for the Conservation Commission in the sale of hunting and fishing licenses."

We are of the opinion that your letter raises two legal issues:

(1) May the County Clerk, under the constitution, hold the position of a county officer, and also the position of Agent for the Conservation Commission in the sale of hunting and fishing licenses?

(2) Does Article VI, Section 12 of the Constitution prohibit the County Clerk from selling hunting and fishing licenses and thereby receiving a fee for the same?

In answering the first question we must consider the applicability of the rule of law that a public officer may not hold two incompatible offices at the same time. This rule is stated in State vs. Grayston (1942 Mo. Sup.) 163 S.W. (2d) 335. That case makes it clear that the offices must be incompatible in order for the rule to apply. The tests of incompatibility, set out in that case, are:

"* * * Whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

The Office of County Clerk and the action of the County Clerk in selling hunting and fishing licenses are not, in our opinion, in any way conflicting, and does not fall within any of the tests set out in that case. We know of no other constitutional provision or rule of law which would prohibit the County Clerk from selling hunting and fishing licenses on the basis that he can not hold two such offices at the same time.

An answer to the second question involves the interpretation of Article VI, Section 12, of the Constitution, which reads as follows:

"All public officers in the City of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, except public administrators and notaries public, shall be compensated for their services by salaries only."

The question which we need to determine is whether this constitutional provision means that county officers are to be compensated for their services, as county officers, only by salary, or whether they are to be compensated for all services they perform by salary only.

It is well to note at the outset that Sections 8913 and 8916, Revised Statutes of Missouri, 1939, designating the County Clerks and the License Collector of the City of St. Louis as the persons who may issue hunting and fishing licenses, have been repealed by the 63rd General Assembly. However, the broad powers given to the Conservation Commission under the provisions of the Constitution, and the interpretation of similar provisions in the 1936 amendment to the Constitution of 1875, by the case of *Marsh v. Bartlett*, 121 S. W. (2d) 737, leave little doubt that the Conservation Commission has the authority to designate the County Clerks as agents for the sale of hunting and fishing licenses, and to designate a fee which the County Clerks may retain as compensation for the performance of this duty. We, therefore, proceed in this opinion on the assumption that the Conservation Commission will continue to designate the County Clerks as agents for the sale of hunting and fishing licenses, and allow them a fee therefor.

The constitutional provision, above quoted, is new, and was not carried in the Constitution of 1875. There are, therefore, no cases which have construed this provision. However, the Missouri courts have several times construed the provisions of Article V, Section 24, of the Constitution of 1875, on the exact point presented for our determination. Article V, Sec-

tion 24, of the Constitution of 1875, reads, in part, as follows:

"The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms; and they shall not, after the expiration of the terms of those in office at the adoption of this Constitution, receive to their own use any fees, costs, perquisites of office, or other compensation. All fees that may hereafter be payable by law for any service performed by any officer provided for in this article shall be paid in advance into the state treasury."

It will be noted that this constitutional provision is the same, with regard to the point here at issue, as Article VI, Section 12 of the new constitution for the reason that both sections declare that the salary which certain officers are to receive in lieu of all other compensation is a salary "for their services". Therefore, an interpretation of Article V, Section 24, regarding the meaning of the words "for their services" would, in our opinion, be determinative of the meaning of these words in Article VI, Section 12 of the new constitution.

Article V, Section 24 of the Constitution of 1875, has been construed in several Missouri cases.

In State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S.W. 453, the court had before it the question of whether the Attorney General could be allowed a fee in addition to his salary for the prosecution of unlawful combinations in restraint of trade. The court in that case held that the Attorney General was not entitled to such a fee for the reason that the prosecution of these cases was a part of the duties of the Attorney General. They made it clear, however, that the statutory limitation on salaries under Article V, Section 24, of the Constitution of 1875, would not apply if a duty imposed upon the Attorney General did not, in any way, pertain to the Office of the Attorney General. In this regard the court said:(l.c. 204-5)

"Realtor describes the duties imposed on the Attorney General by the statute, in relation to the prosecution of trusts and combines in restraint of trade, as 'unusual and extraordinary.' If by that he means that the duty is not incident

to the office of Attorney-General, and such is the fact, his second position is well grounded. For while the Constitution says that he shall receive a salary for his services, and that he shall perform such services 'as may be prescribed by law' (Sec. 1, Art. V), yet it could not have been intended that duties should be imposed upon him which in no way pertain to the office of the Attorney General. It is for the performance of those duties, and those only, that the salary is given him. It would no doubt not be competent for the Legislature, for example, to require the Attorney-General, as attorney-general to perform the duties of warden of the penitentiary, or superintendent of one of the hospitals for the insane. But if it should designate him as the person to fill either of these offices, and he accepted, a provision for compensating him for the services to be performed in connection therewith would not be obnoxious to the Constitution. Such is the substantial basis of decision in State v. Walker, 97 Mo. 162."

In Thatcher v. St. Louis, 343 Mo. 597, 122 S. W. (2d) 915, the Supreme Court of Missouri had before it a question almost identical with that in the Boeckler case. In the Thatcher case the question was whether the Attorney General could retain a fee paid out of a trust fund which was to be paid to attorneys for the Attorney General of Missouri. The court in that case again discussed the same constitutional provision as it did in the Boeckler case, and cited the Boeckler case with approval, quoting much of that part of the Boeckler case which is quoted above in this opinion.

The court held that the allowance of such fees was unlawful, giving the same reason as given in the Boeckler case, namely, that the services performed by the Attorney General's office were duties which pertained to that office.

It is, therefore, clear that the words "for their services", in Article VI, Section 12 of the Constitution, must be interpreted as meaning only those services which the county officers perform as county officers.

The determination remaining, therefore, is that of whether the selling of hunting and fishing licenses can be said to pertain in any way to the office or to the duties of a County Clerk. In this connection the case of State ex rel.

Buchanan County v. Imel, 280 Mo. 554, 219 S.W. 634, is enlightening. In that case the Supreme Court of Missouri construed a statute which provided that whenever the amount of fees collected for any year, by any Probate Judge, should exceed a sum equal to the annual compensation provided by law for a Judge of the Circuit Court having jurisdiction in said county, the excess less ten per cent, should be paid into the County Treasury. The court held that the words "compensation provided by law for a Judge of the Circuit Court" meant the Circuit Judge's salary for judicial services, and did not mean to include money received by the Circuit Judge for other fees such as his services as jury commissioner. With reference to the services other than those to which the statute referred, the court had this to say: (l.c. 564)

"* * * Other compensation authorized to be paid to this class of officials is for added duties in no sense judicial, the performance of which has been imposed upon them arbitrarily by the Legislature, more as a matter of convenience than for any other apparent reason. The statutes (Laws 1905, p. 174, and 1907, p. 322) designating certain circuit judges as jury commissioners afford illustrations of this character of legislation. In construing them in State ex rel. Harvey v. Sheehan, 269 Mo. l.c. 429, we held that the remuneration therein provided for constituted no part of the judge's compensation for judicial services.* * *"

We are of the opinion that the designation, by the Conservation Commission, of the County Clerks as agents of the Commission for the sale of hunting and fishing licenses partakes of the nature of that which is imposed, to use the words of the Imel case, "more as a matter of convenience than for any other apparent reason."

Furthermore, since the Conservation Commission is an agent of the state, we think that the County Clerks would be acting as agents of the state rather than as agents for the county. Also, there is no statutory duty placed upon the County Clerks to sell hunting and fishing licenses. It cannot be said, therefore, that this is a duty placed upon the clerk by any legislative authorization, and that, therefore, the sale of licenses constitutes a portion of the statutory duties of one who holds the Office of County Clerk. It should

be noted, also, that the selling of licenses is not so connected with the county that it can be said to be a part of the administration of county affairs.

We think, therefore, that selling hunting and fishing licenses does not pertain to the Office of the County Clerk, and that the provisions of Article VI, Section 12 of the Constitution are applicable only to compensation which pertains to the Office of the County Clerk.

CONCLUSION

It is, therefore, the opinion of this department that the County Clerk, in counties of the first class, may continue to receive fees as agents for the Conservation Commission in the sale of hunting and fishing licenses.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

SNC:dc

APPROVED:

J. E. TAYLOR
Attorney General

SHERIFFS : House Committee Substitute for House Bill
No. 872 is effective as of July 1, 1946.
CONSTITUTIONAL LAW: House Committee Substitute for House Bill
No. 872 is not in conflict with Sec. 13 of
Art. VII of the Constitution of 1945.
Payment of salaries of sheriffs of counties
of the fourth class would not be in viola-
tion of county Budget Law.

Memo

July 8, 1946



Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This department is in receipt of your recent letter
requesting an opinion, based on the following state of facts:

"Please let me have your opinion as
to whether or not House Committee
Substitute for House Bill No. 872
which has been passed by the legis-
lature and signed by the Governor,
and which provides salaries for she-
riffs and their deputies in counties
of the fourth class, will apply to
the sheriff who was elected prior to
the adoption of the present Constitu-
tion.

"This act provides that it shall be-
come effective on July 1, 1946. This
act will greatly increase the compensa-
tion of sheriffs during their term of
office, and is apparently in conflict
with Sec. 13, Art. 7, Constitution 1945,
which provides the compensation of of-
ficers shall not be increased during
the term of office, etc.

"In as much as the county could not
issue warrants for salaries to pay
officers under this act without vio-
lating the Budget Law, then if this law
becomes operative on July 1, 1946,
salaries could not be paid for the re-
mainder of the year unless at the end

of the year there would be a surplus,
if I correctly understand the law."

Your letter presents three distinct questions, and they have been answered in the order in which you have them enumerated.

As to question No. 1, your attention is called to Section 3 of the Schedule of the Constitution of 1945, which provides as follows:

"The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

The sheriff, therefore, would hold his office for the term to which he was elected, which of course would be after July 1, 1946.

Section 2 of the Schedule provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, shall remain in full force and effect until July 1, 1946."

Since Section 13413, R.S. No. 1939, which provides the fees of sheriffs in criminal cases, is inconsistent with Section 13, Article VI of the Constitution of 1945, which provides for a salary in criminal matters, it was, as of July 1, 1946, repealed and inoperative. House Committee Substitute for House Bill No. 872 was passed and became effective as of July 1, 1946, for the very purpose of carrying out the mandate of Section 13, Article VII of the Constitution, and did place the sheriff, then in office, on a salary basis in criminal matters.

Section 13, Article VI of the 1945 Constitution, could also be said to be effective as of July 1, 1946, the date set out in Section 2 of the Schedule, supra, because it is self-

executing. This principle finds support and authority in 11 Am. Jur., Section 73, pages 690 and 691, and cases cited, which in part is as follows:

"It has been said that in the determination of whether a provision is self-executing, the question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature. * * * * *

"Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions. Thus, it has been held that * * * * * a constitutional provision that particular officials shall be paid by salary instead of by fees is self-executing, although the determination of the amount of the salary is left to the legislature."

It follows, therefore, that the sheriff's term of office is not affected by the new Constitution and he remains in office, and that Section 13, Article VI of the new Constitution became effective on July 1, 1946, is self-executing and would apply to the sheriff in office at that time, even if House Committee Substitute for House Bill No. 872 had not been passed by the General Assembly.

Considering the second question, the act finds constitutional authority under Section 13, Article VI of the 1945 Constitution, which is as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons, accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the

same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

It follows that if this act is in conflict with Section 13, Article VII of the Constitution of 1945, and consistent with Section 13, Article VI thereof, then the two sections of the Constitution are in apparent conflict and must be construed. The rule of construction as to this kind of a situation may be found in 11 Am. Jur., Section 53, pages 661, 662 and 663, which reads in part as follows:

"In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision, and if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.

"It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. * * * Therefore, particular phrases of a Constitution must be construed with regard to the remainder of the instrument and to the express intent of the constitutional convention in adopting it. For example, the first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia.

"Cases may arise where it is impossible to harmonize or reconcile portions of a Constitution. In such a case, if there is a conflict between a general and a special provision in a Constitution, the special provision must prevail in respect of its subject matter, as it will be regarded as a limitation on the general grant."

Section 55 of the same volume, pages 665 and 666, is as follows:

"An elementary rule of construction is that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. Fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other. Hence, as a general rule, a court should avoid a construction which renders any provision meaningless or inoperative and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.

"The rule is well established that no court is authorized so to construe any clause of the Constitution as to defeat its obvious ends where another construction equally accordant with the words and sense thereof will enforce and protect it. * * *"

Section 61 of the same volume, pages 674 and 675, is as follows:

"The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it. A constitutional clause must be construed reasonably to carry out the intention of

the framers, which gives rise to the corollary that it should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent. The intent must be gathered from both the letter and spirit of the document.

"It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters.

"Wherever the purpose of the framers of a Constitution is clearly expressed, it will be followed by the courts. Even where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered."

The Missouri courts have followed this construction without exception. In the case of State v. Koeln, 61 S.W. (2d) 750, 1.c. 755, it was said:

" * * * * But under established rules of construction the courts should resolve seemingly conflicting or overlapping provisions of the Constitution by harmonizing them and rendering every word operative, if possible, so as to give effect to the whole. * * * *"

In the case of State v. Williams, 144 S.W. (2d) 98, 1.c. 103, the court said:

"It is elementary that in constitutional construction all the provisions bearing upon a particular subject are to be considered together and effect given to the whole. * * * *"

Applying the foregoing rules of construction to these two sections of the Constitution, it could easily be said that the article setting the compensation of the sheriff is a specific provision, and the section prohibiting the increase in compensation a general one, so the specific provision prevails and would be an exception or limitation to the general provision. This is especially true where both sections were passed or adopted at the same time, because it must be assumed that the framers of the Constitution, and the people who adopted it, had both sections in view when they acted.

In applying the mandate that the courts must harmonize, if possible, what might seem to be conflicting sections of a Constitution, the court could say, and rightfully so, that after adoption of the Constitution, and on July 1, 1946, the sheriff's compensation will be governed by Section 13, Article VI of the Constitution of 1945, and that thereafter his compensation will not be increased in view of Section 13, Article VII of the Constitution of 1945. This would harmonize and make operative both sections, thereby carrying out the apparent intent of the framers of the instrument and of the people who adopted it.

The foregoing discussions were, in the main, based upon the assumption that House Committee Substitute for House Bill No. 872 did increase the sheriff's salary. To this assumption, however, we do not subscribe, because under the previous fee statute which was repealed by both House Bill No. 872 and the Constitution, as of July 1, 1946, the sheriff, in counties such as Iron, was entitled to fees as provided by Section 13450, R.S. No. 1939, which provides:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. * *

The maximum, under this section, was \$5,000. The new act

set the salary at \$1,800.

The fact the sheriff did not collect the maximum under the old fee statute would make no difference. In the case of State ex rel. v. Farmer, 271 Mo. 306, l.c. 314, 316 and 317, the court said:

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the Act of 1915, does not exceed but exactly equals the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2000 yearly cash salary, the provisions of the Act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term.

* * * * *

"So, while it is conceded as the figures indicate, that there has been no increase in the stated amount fixed by law as the pay of a circuit clerk during the current term of this relator, yet it is urged there has been an increase in fact, unless the fees collected each year amount to as much as \$2000, regardless of the statutory provision existing when relator took office of retaining as his annual compensation \$2000 out of the fees earned and collected.

* * * * *

"The Act of 1915 putting circuit clerks upon a salary basis, was, it is plain, designedly enacted so that the several salaries fixed thereby and made payable

monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the Act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from twenty-five to thirty thousand population would get the salary fixed by the Act of 1915 some years, and get fees other years, and it would be impossible ever to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it (*State v. Baskowitz*, 250 Mo. 82); the other is that where one construction of a statute would render the act absurd and unenforceable and the other the converse, we are required to adopt the latter rather than the former. (*State ex rel. v. Gordon*, 266 Mo. 1.c. 411.)

* * * * *

"We are constrained therefore to hold that the Act of 1913 (Laws 1913, p. 702) fixed the basic compensation for clerks of the circuit courts and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as

their several compensations, constitute the salaries from which we are to determine whether the Act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question and conclude that as to the relator there has been no increase and the act is constitutional. Let the judgment of the learned judge nisi be affirmed. * * * *

As can readily be seen, the sum of \$1800 falls far short of the former maximum of \$5000. The addition of civil fees would not, in all probabilities, exceed the former maximum, but in the event they did, we think this act would be constitutional according to the rules of construction hereinbefore cited and discussed.

In the event this act was, as you suggest, in conflict with the county Budget Law, your question would be answered by Section 2 of the Schedule of the 1945 Constitution, supra.

We do not believe, however, that this construction is necessary, because the county Budget Law, Section 10911, R.S. Mo. 1939, places salaries of officers in the fourth classification. It provides six different classifications so that when it is necessary to add to an item in the budget it should be revised and the amount taken from items of less priority for which allowances have been made or budgeted. In the case of *Gill v. Buchanan County*, 142 S.W. (2d) 665, 1.c. 668, 669, the court said:

"Defendant also contends that plaintiff is not entitled to recover because there was not a sufficient amount provided in the 1934 county budget for county court salaries to pay salaries of \$4,500 each. * * * * This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' *Traub v. Buchanan County*, 341 Mo. 727, 193 S.W. (2d) 340, 342.

"To properly accomplish that purpose, mandatory obligations imposed by the Legislature and other essential charges should be first budgeted, and then any balance may be appropriated for other purposes as to which there is discretionary power. Failure to budget funds for the full amount of salaries due officers of the county, under the applicable law, which the county court must obey, cannot bar the right to be paid the balance. Instead, it must be the discretionary obligations incurred for other purposes which are invalid, rather than the mandatory obligation imposed by the same authority which imposed the budget requirements. We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

Under authority of Section 10927, R.S. No. 1939, which provides for revision of a county budget, and the Gill case, supra, your budget should be revised if it does not contain funds in the fourth classification sufficient to pay the sheriff's salary.

Conclusion.

It is, therefore, the opinion of this department that in counties of the fourth class House Committee Substitute for House Bill No. 272 applies to sheriffs now in office; that said bill is not in conflict with Section 13, Article VII of the Constitution of 1945, prohibiting increases in compensation during the term of office to which an officer was elected; and that the county Budget Law does not preclude the payment of the salary of a sheriff as provided for in the act, nor would the payment thereof violate said law.

Respectfully submitted,

APPROVED:

W. BRADY DUNCAN
Assistant Attorney General

J. E. TAYLOR
Attorney General

WBD:ml

MAGISTRATE COURTS:

Magistrate courts may issue writ of habeas corpus.

July 23, 1946

FILED

48

Honorable H. A. Kelso
Prosecuting Attorney
Nevada, Missouri

*See also opinion to
O. Hampton Stevens
October 8, 1951*

Dear Mr. Kelso:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Will the Probate Judge-Magistrate have jurisdiction in Habeas Corpus proceedings?"

At first glance it would appear that a magistrate court will have jurisdiction in habeas corpus proceedings, in view of the fact that under Section 19 of Senate Bill #207, passed by the 63rd General Assembly, a magistrate court is a court of record, and Section 1591, R.S. Mo. 1939, specifically provides that application for a writ of habeas corpus shall be made "to some court of record in term, or to any judge thereof in vacation".

However, Section 4, Article V of the Constitution of Missouri, 1945, provides:

"The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

The above constitutional provision specifically sets forth and enumerates the courts that may issue and determine original remedial writs, one of which is the

writ of habeas corpus.

The question arises whether Section 4, Article V in setting forth the specific courts that could issue and determine remedial writs, thereby intended to limit such right exclusively to the courts therein enumerated.

There is a rule of construction that "expressio unius est exclusio alterius", i.e., that the expression of one thing is the exclusion of another. If this rule were applied in the instant case then the constitutional provision in mentioning three kinds of courts that may issue extraordinary writs thereby intended to exclude all other courts from issuing such writs. However, our Supreme Court has not looked with favor upon the application of this rule in construing a constitution. As was said by Judge Douglas speaking for the court en banc in *State ex inf. McKittrick vs. Williams*, 144 S.W. (2d) 98, 346 Mo. 1003: "* * * the above doctrine may be applied to a constitution only with great caution. * * *".

In *McGrew vs. Missouri Pac. Ry. Co.*, 132 S.W. 1076, 230 Mo. 496, our Supreme Court said, l.c. 527:

"In *Williams v. Mayor of Detroit*, 2 Mich. 560, 563-564, the court held that though the maxims expressio unius est exclusio alterius and expressum facit cessare tacitum generally apply to the construction of all instruments and laws, there are certain laws to which the maxims cannot be strictly applied without doing violence to the plain intent of the framers of the laws, and that this is especially true in the construction of state constitutions, owing to their character and objects, which the court explained at some length, and then, in effect, said that the imposition by the Constitution upon the Legislature of certain specific duties, limitations, restraints and regulations in certain important particulars, binds the Legislature, of course, in those particulars, but that notwithstanding that, all other acts properly

pertaining to the legislative power of the state are within the competency of the legislative department, and binding upon the people.

"The maxims mentioned in the case last cited have been, by all who make it, counsel and members of this court, invoked as the chief support for the contention that said portion of section 14 limits the power of the Legislature. But those maxims are not rigid rules of unvarying and universal application; they are merely rules adopted for the construction of written words, and like all such rules, are intended to be used for the purpose of ascertaining the true meaning of the words, in order that the purpose intended may be accomplished, and should never be permitted to be used to obscure that meaning or thwart that purpose.* * *".

Therefore, it cannot be said under the principle of "expressio unius est exclusio alterius" that all other courts other than those mentioned in Section 4, Article V, are necessarily excluded from issuing writs of habeas corpus, and we must look to the purpose and intent of the above section to determine whether such section is exclusive or not.

In interpreting a constitutional provision "it is proper to look to previous state of the organic law and the conditions sought to be remedied by the amendment". *Lovins vs. City of St. Louis et al.*, 336 Mo. 1194, 84 S.W. (2d) 127; 16 C.J.S. 69.

Section 4, Article V of the Constitution of Missouri, 1945, made no substantial change from the Constitution of Missouri, 1875. The Constitution of 1875 contained three sections which are now covered by Section 4, Article V.

Section 3, Article VI of the Constitution of 1875, provided that the Supreme Court should have general superintending control over all inferior courts, and have the power to issue various writs, including habeas corpus.

Section 12 of Article VI, Constitution of 1875, gave like power to the St. Louis Court of Appeals in substantially the same language.

Section 23, Article VI of the Constitution of 1875, gave the Circuit Court superintending control over all inferior tribunals in their respective circuits.

It will be seen that Section 4, Article V in the present Constitution merely compiles and condenses the three sections noted above into one provision. The only new feature is that Circuit Courts are specifically given the right to issue and determine remedial writs, which power the Constitution of 1875 had not specifically granted, but which had been implied from Section 22, Article VI, wherein it provided that: "The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for; * * *". State ex rel. York vs. Locker, 266 Mo. 384, 181 S.W. 1001. Therefore, the intent and purpose of Section 4, Article V, supra, was to set forth the jurisdiction of the three courts with which it specifically deals, i.e., Supreme Court, Courts of Appeals and Circuit Courts. The provision intended to apply to and treat with only those courts, and do not intend to determine the question of jurisdiction in habeas corpus proceedings.

This view is borne out by the statement in the Constitutional Convention as to the purpose of Section 4, Article V, supra. While it is true that the statements of the framers are of limited value in construing State Constitutions (State ex rel. Donnell vs. Osburn, 147 S.W. (2d) 1065, 347 Mo. 469), still they may be of material assistance in showing that a clause was used in a certain sense by the framers (11 Am. Jur. 708). Mr. Righter in the Constitutional Convention said in speaking on behalf of Section 4, Article V:

"MR. RIGHTER: I shall appreciate it if the clerk will read Section 4.

(Clerk read as follows:)

"Section 4. The Supreme Court, courts of appeals, and circuit courts shall

have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs.

"MR. RIGHTER: Mr. President, this is one instance in which (sic) we were able greatly to condense and shorten the proper article without in any respect changing its effect. Section 4 is a condensation of sections, parts of sections 3, 12, 23 and I believe Section 8 of the amendment. Heretofore there have been separate sections saying that the Supreme Court had superintending control and that it could issue writs and certiorari prohibitions, mandates, and what not and then sections with respect to the circuit courts and court of appeals. We merely consolidated those all into one short section."

It is well settled in Missouri that prior to the adoption of the Constitution of 1945, those courts mentioned in Sections 3, 12 and 23, Article VI of the Constitution of 1875, did not have exclusive jurisdiction of the writ of habeas corpus, but that other courts, e.g. a county court, could issue such writs under authority given by statute. State ex rel. Hiett vs. Simmons, 87 S.W. 35, 112 Mo. App. 535; State ex rel. York vs. Locker, 266 Mo. 384, 181 S.W. 1001. Therefore, since Section 4 of Article V of the Constitution of Missouri, 1945, is merely a consolidation of Sections 3, 12 and 23, Article VI, Constitution of 1875, then the same rule would apply to that section because the adoption in a later Constitution of the words and contexts by another which have been construed by a court of last resort is presumed to have been done to give the adopted contexts their adjudicated meaning. Ludlow-Saylor Wire Co. vs. Wollbrinck, 275 Mo. 339, 205 S.W. 196.

Therefore, in view of the above authorities it would appear that a magistrate court would have jurisdiction to entertain an application for a writ of habeas corpus.

CONCLUSION

It is, therefore, the opinion of this Department that a magistrate court has jurisdiction to issue a writ of habeas corpus.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

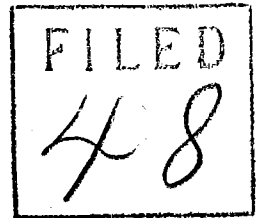
APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

ELECTIONS: A canvasser, who has qualified, casting up the absentee votes is under the duty of certifying to the County Court the result of his canvass, and this is so regardless of the number of votes or whether there are any absentee votes.

November 19, 1946



11/25

Mr. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The county clerk as authorized by Section 1475 and 11476, Laws 1945, appointed two Republicans and two Democrats whose names had been given him by the committee of each party, to open, canvass, count and certify the absentee ballots.

"As I am informed by the clerk the Republican canvassers challenged the absentee ballots and refused to sign and certify the absentee vote and gave no reasons in writing why they refused to do so, but made oral objections in their challenges stating they were not entitled to vote as they were not residents of the county. The clerk also appointed one Republican and one Democrat to assist in casting up the vote of the election held on November 5, 1946, as provided by Section 11615, Laws 1945, which they did but as the two Republican canvassers selected to cast up the absentee ballots refused to certify the returns as to the absentee ballots, these votes were not counted in with the final vote. I find no statute which seems to apply to a condition as this, where the two Republican canvassers refused to sign and certify to the result of the canvass

as to the absentee ballots, but the two Democratic canvassers did sign the result.

"Section 4375, R.S. 1939, makes it a misdemeanor for any judge or clerk who shall fail to sign and deliver to the county clerk the statement required by law of his reasons why he refuses to sign the registry books, and other books, blanks and forms required, etc., shall be deemed guilty of a misdemeanor, etc.

"I will appreciate your opinion as to whether the two judges or canvassers appointed to cast up the absentee ballots violated any law in refusing to certify as to the result, if Sec. 4375 does not apply, and further, if the clerk should certify the result of the election to the secretary of state and include the absentee vote, yet in as much as the clerk will have to certify the result of the election before you can give me your opinion, it will perhaps be of little use as to that matter, but your opinion will be useful to me as to the failure of the two canvassers to sign and certify the result of the canvass of the absentee ballots."

Replying thereto, your inquiry seems to indicate that you desire an opinion from this office bearing on the failure of two of the canvassers, who were appointed along with two others, to cast up the absentee ballots and certify the results thereof to the County Court, and this opinion is in response to that inquiry.

The statutes have been revised and amended so much that it is not difficult to understand your troubles in running down this question. In the 1939 Revised Statutes it was the duty of the county clerk and two judges of the County Court, or two justices of the peace, in each county not having registration, to cast up the vote within five days after the election. Section 11615 provides:

"The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the

votes given to each candidate, and give to those having the highest number of votes certificates of election."

Section 11630, R.S. 1939, places that duty upon the Board of Election Commissioners in St. Louis and Kansas City, and other cities having registration. Said section is as follows:

"The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

Section 11616, R.S. 1939, provides:

" * * * * it shall be the duty of the county clerk of such county, * * * * before certifying to the nomination or election of any candidate for a county office, * * * * to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candidates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

Section 11618, R.S. 1939, prescribes the penalty for the last above-mentioned section.

The above last-mentioned two sections appear to more particularly apply to the precinct records and the duty of the County Court to record the true vote, as shown by the tally sheets of the various precincts.

Senate Bills Nos. 46 and 47, and House Bill No. 241, are next mentioned. Each of them has an emergency clause. Senate Bills Nos. 46 and 47 were approved July 27, 1945, and House Bill No. 241 was approved October 20, 1945. Senate Bill No. 46, in Section 11476, provides:

"In cases of elections wherein the county court or board of election commissioners as the case may be are not charged with the duty of canvassing the returns of such elections, the body or officials, charged by law with such duty for such elections, shall appoint not less than four disinterested persons, not more than one-half of whom shall be of the same political faith, * * * * not later than 6:00 o'clock p.m. of the day next succeeding the day of such election; * * * * to open, canvass, count and certify the votes cast by absent voters at such election, * * *"

The writer does not understand the reason for the enactment of Senate Bill No. 46, because it would seem only to apply in instances wherein the County Court or Board of Election Commissioners are not charged with the duty of canvassing the returns of the elections, and, as the writer understands the statutes, those are the only two bodies which are charged with such duty.

Since Senate Bill No. 47, next mentioned, contemplates that the County Court and Board of Election Commissioners are the two bodies in their respective spheres which so function, said section prescribes the duty of the county clerk issuing ballots to absent voters to receive and keep the said ballots, to make a list thereof, showing the precinct of claimed residence, and to publicly post it at least twenty-four hours before opening the ballots. Then it provides:

" * * * * Whenever the county court of any county, or the board of election commissioners, as the case may be, shall meet to canvass the votes according to law they shall first appoint not less than four disinterested persons, * * * * for the purpose of opening and counting said absentee vote, and the said persons so appointed shall take the oath prescribed for the regular judges of election, and shall at once proceed to open, canvass and count such votes, and having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote, and having been fully satisfied

thereof they shall certify to the county court, or to the election commissioners, as the case may be, the number of qualified votes to be counted for each of the respective candidates voted for in such election precinct, * * * * and shall forthwith make such certificate to the county court, * * * who shall tabulate such vote along with the other votes certified from the several precincts of the county and credit the same to the candidate * * * * for whom or for which said absentee votes were cast in arriving at the total result of the election * * * *

House Bill No. 241, in Section 11615, provides that "The clerk of each county court shall, within five days after the close of each election, select for his assistants one person from each of the two political parties casting the highest number of votes * * * * and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election," and such persons shall be selected from party lists at least fifteen days prior to appointment, provided said lists are supplied, and on failure so to do, then the clerk names them.

House Bill No. 241 repeals Section 11615, R.S. 1939.
Senate Bill No. 46 repeals Section 11476, R.S. 1939. Senate Bill No. 47 repeals Section 11475, R.S. 1939.

Section 11477, R.S. 1939, provides that the vote of an absent voter may be challenged "for good cause and the judges so appointed to open, canvass count and certify the votes of such absent voters shall have all the power and authority given by law to regular judges of election to hear and determine the legality of such ballot."

Section 11478, R.S. 1939, provides for the sealing, secrecy and safekeeping of such ballots.

Section 11480, R.S. 1939, provides the penalty for violation of Article 2 of Chapter 76, and says:

" * * * * If any person shall violate any provision of this article, or fail to comply with any provision hereof for which no other punishment is herein provided, such person shall upon conviction thereof, be deemed guilty of a misdemeanor."

Section 11503, R.S. 1939, requires judges of election to take an oath, which in part is as follows:

"I do solemnly swear that I will impartially discharge the duties of the present election according to law, * * * *"

Section 11506, R.S. 1939, places a penalty on failure of a judge or clerk to perform his duty, and provides:

"If any judge or clerk, after he shall have undertaken to perform the duties herein pointed out, fail so to do, he shall be fined two hundred dollars, to be recovered by civil action, in the name of the county, or by indictment, and in either case the fine shall go into the county treasury."

The particularly applicable law to the question here discussed appears to be in Senate Bill No. 47, which provides for the appointment of not less than four disinterested persons for the purpose of opening, canvassing and counting the absentee votes. This law further places the duty on them to "take the oath prescribed for the regular judges of election." It further places the duty on them to "proceed to open, canvass and count such votes, and having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote, and having been fully satisfied thereof they shall certify to the county court, * * * the number of qualified votes to be counted * * *" The only way the law provides for the information which they get from opening and counting the absentee votes, and their determination of how many absentee votes there are or that should be counted, is by the method set forth in said law, to wit, "and shall forthwith make such certificate to the county court." If it were not clear that such is their duty, any former doubt would be removed by reference to the provisions of said law thereafter following the above quoted portion, which reads, "who shall tabulate such vote along with the other votes certified from the several precincts of the county." The official information can be transmitted in only one way and that is by the way provided by the statute, to wit, "make such certificate."

It will not do to stand mute and do nothing. That would be a complete failure to perform the duty which the law casts on the official designated by law to cast up and certify the result.

It will not do to make oral declarations of protest or of approval of the votes because the statute requires the functioning party to "make such certificate." He is a judge of election, he has taken the oath of an election judge and the law charges him with the obligation to perform the statutory duties of an election judge, and one main duty of such judges is to certify the votes. If there are no votes that in his opinion are legal votes, it is his legal duty to so certify - to "make such certificate." It is just as much his duty to tell the County Court, in the way the statute provides and in the only way provided by law, what the absentee vote is when the total absentee vote is nothing as when it is one or two or a hundred; otherwise, there is a hiatus, there is a gap, the chain of communication is broken; it would be analogous to the case of the election judges in a precinct failing to certify the poll books after an election. Suppose the judges of a precinct were to fail to send in the poll books or were to fail to certify the vote in, but on the contrary would merely telephone in the vote. Would it be contended that they had performed their statutory duty as election judges? There is no greater duty on them than on those casting up the absentee vote to so certify.

Conclusion.

It is our opinion that where an individual is one of four who has been appointed to cast up the absentee vote in a given county where there is no registration, and he has qualified as such, it is his duty to sign a certificate certifying to the County Court the result of the casting up of said absentee vote. It does not necessarily follow that each of the four so appointed are of the same opinion and must each sign the same certificate, but if one or two of the four so appointed disagree with the others so appointed, it is his duty to certify his own views to the County Court, and his failure to do so is a violation of his duty as an election judge and he is subject to the penalty provided by Sections 11480 and 11506, R.S. 1939.

Yours truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

CRIMINAL LAW: Venue of crimes committed with absentee
ABSENTEE VOTING: voting is in county where affidavit and
ballot are received and cast.

FILED

December 5, 1946

12/12
Mr. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This will acknowledge your request for an opinion, based
on the following facts:

"A person who lived in St. Louis,
Missouri, who was registered there
and voted there in the general elec-
tion on November 5th, applied for
and received an application to vote
an absentee ballot in this County
which formerly was his home. The
application and ballot were prepared
in St. Louis and forwarded to the
county clerk here by mail.

"The application was made in due time
prior to the election and his ballot
received in due time.

"Of course he could not legally vote
there and also here. He had been
registered as a voter in St. Louis
since July 7, 1944. As above stated,
he was not in this county when he ap-
plied for, received and prepared the
application for an absentee ballot and
prepared the ballot, and it was sent by
mail as stated.

"I hardly understand that I could file
a criminal charge against him in this
county. Let me have your opinion, as
to whether or not he could be legally
prosecuted here."

At the outset, we wish to state that we are unable to find a case in Missouri or in any jurisdiction in point, or a case containing facts similar to the one in question; nor can we find a statute establishing the venue in criminal cases relating to absentee voting or affidavits made by such voter.

Section 2, Article VIII of the 1945 Constitution, provides the qualifications of voters, and is as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people: * * *"

For the purpose of this opinion we are assuming, from the facts stated in your request, that this voter was a resident and a legally qualified and registered voter of the City of St. Louis, and was entitled to cast his vote there in the general election held November 5, 1946. Based upon this assumption, we have concluded that the voter was not a resident of Iron County, as provided by the Constitution; that the affidavit made by this person was false, and that the absentee vote cast by him in that county was illegal and would therefore be the acts upon which any criminal action should be founded. To strengthen this conclusion, we believe the constitutional provision quoted heretofore would be a complete defense to a charge against this voter that the ballot he cast in St. Louis was illegal or constituted a violation of the criminal laws.

Having concluded that making of the false affidavit and the voting of the absentee ballot constituted violations, the question then arises as to which sections of the statutes were violated. We have examined the several statutes relating to absentee and fraudulent voting, and it is our opinion that Section 4355, R.S. Mo. 1939, covers the situation as to the actual voting. Said section is as follows:

"Every person who shall, at any election held in pursuance of the laws of this

state, or of any city or other municipality thereof, vote more than once, either at the same or a different place, or shall knowingly cast more than one ballot, or shall vote at any such election knowing that he is not a qualified voter and is not entitled to vote, and every person who shall knowingly advise or procure any person to vote who is not entitled to vote, or shall knowingly advise or procure any illegal vote to be cast at any such election, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars, or by both such fine and imprisonment."

Section 11460, R.S. Mo. 1939, applies as to the false affidavit, and is as follows:

"If any person shall wilfully and falsely make any certificate, affidavit or statement, which certificate, affidavit or statement is required to be made by the provisions of this article, such person shall upon conviction thereof be deemed guilty of a felony and punished by imprisonment in the penitentiary for two years or by a fine of not less than fifty dollars and imprisonment in the county jail for not less than thirty days nor more than one year. If any person shall violate any provision of this article, or fail to comply with any provision hereof for which no other punishment is herein provided, such person shall upon conviction thereof, be deemed guilty of a misdemeanor."

Having reached the conclusion that the making of the false affidavit in St. Louis and the casting of the absentee ballot in Iron County (by mail from St. Louis) constitute a

violation of Section 4355, supra, it must then be determined whether the venue of any criminal action would be in the City of St. Louis where the affidavit and ballot were prepared, or in Iron County where it was received by mail and cast with the other ballots voted at the election.

The Legislature passed laws permitting absentee voting and enacted, among them, a section declaring the purpose of the laws. Said Section is 11481, Mo. R.S.A., which provides as follows:

"This article shall be deemed to provide a method of voting by voters absent from their county on the day of election and is in addition to the method now provided by statute in cases where the voter is present in the county where such voter resides on the day of such election and to such extent is amendatory of and supplemental to existing statutes, not herein expressly repealed."

By stating that absentee voting provides a method of voting by a person in their county when absent is an addition to the method provided for voting when they are present in the county, it could be construed to mean that the person voted in his county and for the purpose thereof was at least constructively present therein when he prepared and voted an absentee ballot.

In 29 C.J.S., Elections, Section 337, page 451, it is stated:

"Matters relating to jurisdiction and venue in prosecutions for violations of election laws are governed by the principles applicable in criminal cases generally, * * * *"

It might be well to add here that the new Constitution of Missouri does not make any provisions regarding the venue in criminal cases.

Section 3767, Mo. R.S.A., provides:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

As stated above, we do not find any other provision of the statute relating to the venue in these kind of cases so that the general law placing venue in the county in which the offense was committed would be applicable, therefore it must be determined where the offense was committed.

As stated hereinafter in our conclusion, we are of the opinion that the offenses were committed in Iron County, and in support thereof cite the following:

22 C.J.S., Criminal Law, Section 173, page 265, which is as follows:

"By 'venue' is meant the jurisdictional locality, ordinarily the county, in which criminal acts are alleged to have occurred. * * * * 'Venue' has also been defined as the county or jurisdiction in which the action is brought for trial. Venue is a jurisdictional fact, but it is not an element of the offense, and need not, as a general rule, be proved beyond a reasonable doubt, * * * * further, it has been said that persons obviously guilty of criminal acts cannot escape punishment through technical questions of venue."

Section 174 of the same volume, pages 265 and 266, is as follows:

"An offense is committed of course in that county in which the acts constituting the same are done, and, where the acts are done in different counties, the general rule is that the offense is committed in that county in which it is consummated, although in such a case statutes often permit the venue to be laid in either county, * * * * A person accused of crime cannot himself, or through the connivance of others, get himself arrested and bound over to give jurisdiction to a county of his preference, in fraud of the prosecuting officers, acting in good faith, to fix it elsewhere if they chose to do so in the interest of a fair trial. * * * *"

Section 133 of the same volume, page 277, provides:

"The presence of the offender within the county where a crime is committed is not always essential, but some portion of the act, or of the omission to act, must have taken effect there.

"Where a person procures the commission of a crime in one county through the agency of an innocent person, he is a principal and indictable in the county where the crime was committed, although he was not in such county at the time of its commission."

The new Constitution of Missouri, Section 7 of Article VII, provides that a person may vote an absentee ballot with-
in or without the state, and if it was held that the place of preparing the ballot and signing the affidavit established the venue or the place the crime was committed, such holding would defeat any prosecution for illegal voting because it would not be possible to force the attendance of witnesses or the production of the elections records and documents in another state.

The foregoing is stated for the purpose of pointing out the impracticability of a rule requiring the voter's actual physical presence in a county or state before he could be tried therein for casting a fraudulent ballot. Furthermore, it is the county in which the ballot is cast that is affected by the fraud. If a person applied for a ballot and received same along with the form of affidavit to be executed, and completed same and marked the ballot but did not return same to the county from which he received the affidavit and ballot, the criminal offense would not be complete and it could not be said he committed an offense in the county where he prepared same. These acts would be more or less similar to the process of conceiving a criminal offense in one county to be actually perpetrated or committed in another. We think this proposition is analogous to the cases where forged instruments are prepared in one jurisdiction and sent to another for completion of the transaction, and also obtaining money or property by false pretenses where the pretense is made in one jurisdiction and the money or property actually delivered or received in another. In the case of *State v. Mandell*, 133 S.W. (2d) 59, 1.c. 64, the court said:

" * * * * The general rule is announced to be that the proper venue in prosecutions for obtaining money by false pretenses is in the county where the money or property is actually obtained. In the case before us Mrs. Springer parted with her money in the City of St. Louis when the checks were charged to her account. Until that occurred she had full dominion over it. A case in point is *Raymond v. State*, 116 Tex. Cr. R. 595, 33 S.W. 2d 192. It was there held in a prosecution for obtaining money under false pretenses that the venue was in Shackelford county. The check upon which the money was obtained was drawn on a bank in Shackelford county but cashed by the defendant in a bank in Tarrant county. The exact situation as that in the case before us. We rule that the venue of the crime was in the City of St. Louis. The fact that the \$500 cash and the draft for \$1000 drawn on a bank in Franklin county were delivered to appellant in St. Louis county does not defeat the prosecution for the money obtained falsely in the City of St. Louis. * * * *"

Based on the foregoing rule, it could not be said that the false affidavit or ballot constituted an offense or in any way affected the purity of the election in Iron County until it was received there, and by the same token it could be said that when the affidavit and ballot were received it completed the criminal act, and the criminal intent of the voter to perpetrate a crime by means of a false affidavit and fraudulent ballot was committed against and in Iron County.

It is stated in 14 Am. Jur., Criminal Law, Sections 227 and 232, pages 926 and 929, as follows:

Sec. 227.

"A question often arises as to the jurisdiction of a crime where the accused, while in one state, sets in motion a force which operates in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person

in another state with intent to injure him. In such cases the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act.
* * * *

Sec. 232.

"At early common law, the proper venue of a crime was the county where it was committed. This is generally the rule today in this country, the rule having been recognized by the courts or established by constitutional provision. By the provisions of the Federal Constitution, criminal trials must take place in the state and district wherein the crime was committed, but it was long ago determined that these provisions apply only to prosecutions in Federal courts. The place where the person who committed the crime was at the time is not necessarily the place where, in contemplation of law, the crime was committed. The place where a crime is consummated is often, in contemplation of law, the place where it was committed. This is true as to the offense of obtaining property by false pretenses which were made in one state or county but effectuated in another. The locality of a crime in the commission of which the United States mails are used depends on where the crime is consummated. Sometimes, the crime is complete as soon as the communication is put into the mails; sometimes, when the communication reaches its destination. Depositing a forged instrument, for instance, in the mail directed to another county makes, not the county in which it was mailed, but the county where the instrument was received, the place of offense of uttering it, if such offense is committed. A charge of bribery, alleged to

have been committed by mailing a letter in one state directed to certain officers in another, is triable in the latter. * * * *"

The Supreme Court of Missouri said in the case of State v. Mispagel, 207 Mo. 557, l.c. 582:

"In State v. Fraker, 148 Mo. l.c. 160, this court, in discussing the correct rule as applicable to the question now under consideration, said: 'When, as here, a crime consisting of a series of acts, part done in one county and part done in another, it is dispunishable at common law in either, unless enough be done in one county to amount to a completed and punishable criminal act,' citing 1 Bishop's New Cr. Proc., sections 54, 55 and cases cited, 'and this rule holds in the absence of statutory enactment to the contrary.'"

Applying this rule to the case in question, since we do not have a constitutional or statutory provision applying to venue for the violation of absentee election laws, it could be said, and we think the natural conclusion would be, that while some of the essential acts were committed in another county, the parts which establish a completed and punishable criminal act were performed in Iron County, namely, the receiving of the false affidavit and the casting of the ballot.

In the case of Straughan v. Meyers, 268 Mo. 580, the court passed only on the constitutionality of an absentee voting law, but we cite this case because it throws some light on the question as to where the vote was cast: At l.c. 588 the court said:

"It is next urged by respondent that the act violates that part of section 2, article 3, of the State Constitution, which reads as follows:

"Every male citizen . . . possessing the following qualifications shall be entitled to vote at all elections by the people. . . He shall have resided in the county, city or town where he shall offer to vote at

least sixty days, immediately preceding the election.'

"It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited or counted; but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote. The word 'vote' means suffrage, voice or choice of a person for or against a measure or the election of any person to office. It is not synonymous with 'ballot,' which is merely the means or instrument by which the person votes, or rather expresses his choice or exercises his right of suffrage. (Clary v. Hurst, 138 S.W. 566; State ex rel. v. Blaisdell, 119 N.W. 360; State v. Custer, 66 Atl. 306; Gillespie v. Palmer, 20 Wis. 544; Davis v. Brown, 34 S.E. 839.)

"Had this measure provided that such absent voter could vote, that is, could exercise a right of choice for or against matters relating to the place where he did not reside, for instance, candidates of a county or district other than that of his residence, there would be no doubt of its invalidity; but it does not so undertake. The act specifically provides that the ballot shall not be deposited in the ballot box, nor entered upon the poll books, but that same shall under certain safeguards and regulations, be transmitted to the clerk of the county where the voter resides, and be there counted. The act of legally voting, as the term is understood in law, embodies the right to have the vote counted. This act does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through

which he may vote in the place of his residence."

The necessity of the voter being actually present when he casts his vote is discussed in 14 A.L.R., page 1263. This is not a criminal case, but it supports the theory that the act of voting and acts incident thereto are in the county in which the voter casts his ballot. The North Carolina Supreme Court said:

"And it was contended in the reported case (Jenkins v. State Bd. of Elections, ante, 1247), in reference to the Absentee Voters Law of North Carolina (Public Laws of 1917, chap. 23, as amended by chap. 322 of Public Laws of 1919), that the words 'in which he offers to vote' in the constitutional provision that voters shall have resided in the state two years, in the county six months, and in the precinct, ward, or other election district in which he offers to vote, four months next preceding the election, and the words, 'every person offering to vote,' in the provision that every person offering to vote shall be at the time a legally registered voter, necessarily implied that the voter must be present in person at the polls and tender his ballot. The court denied this contention, upon the ground that an offer to vote might be made in writing, and that was what the absent voter did when he selected his ballot, and attached his signature to the form, and mailed the sealed envelop to the proper official, and upon the further ground that, if the framers of the Constitution wished to require the personal presence of the voter, they could have easily used words which would have put their meaning beyond doubt. * * * *"

In Virginia, Colorado and Kansas the courts have also held actual physical appearance was not necessary. 121 A.L.R., pages 940 and 941, cites cases from these states, and quotations therefrom are as follows:

"The constitutionality of the Absent Voter's Law was challenged in Moore v. Pullem (1928) 150 Va. 174, 142 S.E. 415, upon the ground

that in dispensing with the personal appearance of the voter at the polls, certain provisions of the Virginia Constitution relating to the elective franchise containing such phrases as 'the precinct in which he offers to vote' and 'that in which he offers to vote,' were violated, the theory being that such language imperatively required the personal appearance of the voters at the polling places on the day of election in order to entitle the elector to vote. The court rejected the contention that the Absent Voters' law was in contravention of the state Constitution, calling attention to the fact that the former phrase was used in connection with a provision relative to the qualification of voters, and the latter in relation to conditions for voting, and stated that there could be no more fallacious or misleading method of construing language than to divorce it from the subject in connection with which it was used. It was then pointed out that the constitutional provision relating to the method of voting contained no word requiring the personal appearance of the voter at the polls, and that the framers of the Virginia Constitution had therein (Sec. 56) specifically provided that the manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office, in cases not specially provided for by the Constitution, should be prescribed by law, and the general assembly might declare the cases in which any office should be deemed vacant where no provision was made for that purpose in the Constitution, the court declaring 'these considerations supply the obvious and, to us, the sufficient reply to all of the objections to the power of the general assembly to enact this statute. The method of voting is not alluded to in the sections relied on, except that it shall be by ballot, be secret, and that some voters may and some may not be assisted in the preparation of their ballots. The method of voting is a different subject, is elsewhere provided for, and is incongruous

to the subjects of these sections, which, as we have stated, and as must be conceded, relate primarily to the voting qualifications, registration, and prerequisites. To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to those different subjects and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the general assembly from passing such a statute, appears to us to ignore fundamental rules of construction.'

"The preceding decision was followed in *Goodwin v. Snidow* (1923) 150 Va. 54, 142 S.E. 423.

"Similarly in *Bullington v. Grabow* (1931) 88 Colo. 561, 298 P. 1059, an act relating to absent voters was held not violative of constitutional provisions that every person possessing certain qualifications should be entitled to vote, among which qualifications was that of residence in a state for twelve months immediately preceding the election at which he offered to vote, and provisions that the general assembly should pass laws to secure the purity of elections and guard against the abuses of the elective franchise. The argument was made that a voter must be personally present when he 'offers to vote' and that the provisions of the Absent Voters' Act failed to safeguard the elective franchise, but the court dismissed the contention, saying that in view of the unanimity of the decisions of other states where the same arguments were presented, upholding the constitutionality of such laws, they had no hesitancy in declaring the act constitutional. The court also commented upon the laudable purpose of the act in that it permitted and encouraged the exercise of the elective franchise by registered voters absent from their county or too ill to attend the polls and said that the fact that the legislature had provided sufficient conditions to be performed by the voters was an adequate

)

compliance with the constitutional provision relating to the purity of elections and the protection against abuses of the elective franchise.

"Again, an Absent Voters' Law was held not violative of a provision of the Kansas Constitution that 'every citizen of the United States of the age of twenty-one years and upwards - who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he or she offers to vote, at least thirty days next preceding such election - shall be deemed a qualified elector,' since the words 'in which he or she offers to vote' did not require the personal presence of the voter at the polling place, and that it was within the constitutional power of the legislature to provide that an offer to vote in the township or ward in which the elector resided could be made by subscribing to the affidavit prescribed in the statutes with reference to absentee voters. Lemons v. Holler (1936) 144 Kan. 313, 63 P. (2d) 177."

(Emphasis ours.)

The underlined part of the Kansas decision indicates very strongly that the affidavit, being one of the acts required of the voter, would be construed as having been made in the county in which said voter offers to vote even though not personally present in said county when the offer (by affidavit) is made.

For the purpose of further argument to support our conclusion, we cite the annotation under Section 11480, Mo. R.S.A., supra, which is as follows:

"Where it appeared that fraud and irregularities on a wide scale existed in connection with 1936 election of both federal and state officers, violations in regard to election of federal officers were within jurisdiction of federal courts, while those which affected election of state officers were within jurisdiction of state. State on inf. of McKittrick v. Graves, 144 S.W. (2d) 91, 346 Mo. 990."

Upon examination of the Graves case we find that it does not specifically contain any reference to false affidavits, but if there were any false affidavits that the prosecuting attorney of Jackson County should have investigated or proceeded upon, they would necessarily have to be ones prepared elsewhere and received in Jackson County because it could hardly be a duty of a prosecuting attorney to investigate and prosecute cases wherein the affidavit was made in his county and sent elsewhere, for the reason he would have no way of knowing about their existence. We are aware that this annotation is not authority, holding the prosecuting attorney should proceed against persons sending false affidavits into Jackson County, but it does indicate that the learned lawyers who compiled the Missouri Revised Statutes Annotated were of the opinion that it would apply, and if that were true the venue of the prosecution of offense for making a false affidavit would be in the county where same was received.

Conclusion.

It is therefore the opinion of this department that, under the facts stated in your request, the defendant could be prosecuted for violating either Section 4355 or Section 11480, R.S. No. 1939, and that the venue of either would be in Iron County, Missouri.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

GENERAL ASSEMBLY: Contingent expense appropriation of 63rd General Assembly limited to expenses of that Assembly.

FILED

49

October 30, 1946

11/1

Honorable R. J. King, Jr.
Chairman, Appropriations Committee
House of Representatives
Sixty-Third General Assembly
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"In view of the paper shortage, the Midland Printing Company has advised me that we might be able to get a carload of paper before the first of the year. It is their opinion that it will be very difficult to secure any amount of paper after the first of the year.

"Under these circumstances, I would like to have an opinion from your office as to whether or not it will be legal for the 63rd General Assembly to purchase paper which they will not use, in order to secure a supply for the 64th General Assembly."

Before proceeding with consideration of the precise legal question which you have presented, we wish to point out that a change in the procedure relative to the purchase of the public printing of the state has been effected by reason of the enactment of S.C.S.S.B. No. 297 of the 63rd General Assembly, and that it is only under particular circumstances that future purchases of paper stock will be made by the State of Missouri.

We direct your attention to a portion of the Act mentioned, particularly that portion of Section 76 thereof reading as follows:

"The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. * * *"
(Emphasis ours.)

Also, Section 83 of the same Act, reading as follows:

"The supply of paper now on hand in the office of the secretary of state shall be transferred to the purchasing division. The purchasing agent shall require state printing contractors to use such paper in the performance of printing for the state until the supply now on hand is exhausted or until September 1, 1946, whichever shall occur first. Thereafter, the contractor shall furnish the paper as a part of the complete printing job unless the purchasing agent shall determine that it would be to the advantage of the state to make separate contracts for the paper." (Emphasis ours.)

From the foregoing, it is clear that no purchases of paper stock are to be made subsequent to September 1, 1946, except after the determination by the State Purchasing Agent that it will be to the advantage of the state to contract for the paper separately.

These procedural changes relative to the public printing of the state are pointed out for your information, as it is a matter which will recur with each session of the General Assembly.

Section 23 of Article IV of the Constitution of 1945 reads, in part, as follows:

" * * * Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."
(Emphasis ours.)

Also, Section 28 of the same Article reads, in part, as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accord-

ance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * * (Emphasis ours.)

Looking to the appropriation for the contingent expense fund of the 63rd General Assembly, which is found as a part of House Bill No. 993, we find the title thereof to read as follows:

"APPROPRIATIONS: Money for the pay of salaries of members of the Sixty-third and Sixty-fourth General Assembly; for contingent expenses of the Sixty-third General Assembly including salaries of elective and appointive officers of the Sixty-third General Assembly; for salaries and expenses of members and employees and clerical hire of the Committee on Legislative Research; and for salaries, etc., of the Missouri Commission on Interstate Cooperation, for the period beginning July 1, 1946, and ending June 30, 1947." (Emphasis ours.)

Section 8.013 of the Appropriation Act reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Sixty-five Thousand Dollars (\$65,000.00), or so much thereof as may be necessary, to pay the contingent expenses and to pay the salaries of elective and appointive officers and other employees of the 63rd General Assembly for the period beginning July 1, 1946 and ending December 31, 1946, as follows:

"Contingent expenses of the	
Senate	\$25,000.00
"Contingent expenses of the	
House.....	40,000.00
Total	\$65,000.00"

(Emphasis ours.)

Reading the Appropriation Act in the light of the constitutional requirements quoted supra, it appears that the determi-

nation of your question will depend upon whether or not the contemplated expenditure is one which might be classed as a "contingent expense" of the 63rd General Assembly. If it be found to be such, then it is within the purview of the declared purpose of the appropriation; if not, the proposed expenditure would be violative of the constitutional provisions.

The word "contingent" is defined in Webster's New International Dictionary, 2nd Ed., as follows:

- "1. Liable, but not certain, to occur; possible.
2. Happening from unforeseen causes, or subject to unforeseen conditions; accidental or incidental; chance.
3. Dependent (upon a preceding event or situation); subject to something else; conditioned or conditional; as, peace contingent upon compliance with the proffered terms.

* * * * *

7. Law. Dependent for effect on something that may or may not occur; as a contingent estate or legacy."

In addition to the common meaning of the word, the phrase "contingent expense" has acquired a well-settled technical meaning in legal phraseology. We quote from *Dunwoody v. The United States*, 22 Court of Claims Rep. 269, l. c. 280:

" * * * The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, &c., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses,'

* * * * *

Also, in *Johnson et al. v. Donham et al.*, 84 S. W. (2d) 374, we find the following definition of the term:

Honorable R. J. King, Jr. - 5

" * * * that is, such expenses as might ordinarily be expected to arise in the conduct of the office, but which might not occur. * * * "

Applying these definitions of the term "contingent expense" to the proposed expenditure for paper, which, as is stated in your letter of inquiry, will not be used by the 63rd General Assembly, it becomes apparent that such proposed expenditure is not within the purpose of the appropriation from which payment is to be made therefor.

CONCLUSION

In the premises, we are of the opinion that the 63rd General Assembly may not purchase a supply of paper which such General Assembly has ascertained will not be used by it, but which is proposed to be purchased anticipatory of the needs of the 64th General Assembly, for the reason that such proposed expenditure is not a "contingent expense" of the 63rd General Assembly, and is therefore not within the purpose of the appropriation from which payment is to be made.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

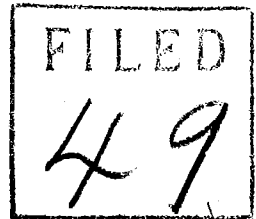
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

APPROPRIATIONS: Legislature is required to enact all other appropriation bills prior to the appropriation bill for expenses of the General Assembly.

December 11, 1946



12/12

Honorable R. J. King, Jr.
Representative, Franklin County
St. Clair, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The 63rd General Assembly has not appropriated, as yet, any sum for the contingent expenses of the 64th General Assembly for the first six months of 1947.

"I would like your opinion on the following questions:

"1. In view of the provisions of Section 36, Article III of the Constitution defining the order of appropriations, can the 64th General Assembly appropriate for their contingent expenses for the first six months of 1947, prior to the passage of the regular appropriation, bills for the next biennium?

"2. Would this appropriation, if made, be considered supplementary to the appropriations of the 63rd General Assembly for the same fiscal period?

"A prompt reply will be appreciated as the General Assembly meets December 12, and if action by this legislature is necessary, it will have to be taken at that time."

Replying thereto, we refer to a number of provisions of the 1945 Constitution bearing on your inquiry. Section 36 of Article III thereof provides:

" * * * the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: For the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other state institutions.

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly."

Section 28 of Article IV thereof provides:

" * * * * No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 23 of Article IV thereof provides:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, * * * *"

We do not find any court decisions construing the above constitutional provisions of the 1945 Constitution, but in the 1875 Constitution Section 43 of Article IV thereof is similar in principle to Section 36 of Article III of the 1945 Constitution. Each of them provides the sequence of the various appropriations. In each of them the various other appropriations are required to be made before the final appropriation for the General Assembly is made. Said section in both Constitutions provides that "all appropriations of money by successive general assemblies shall be made in the following order," then after specifying all the others the last appropriation act shall be "for the expense of the general assembly."

In State ex rel. V. Henderson, 160 Mo..190, 6 S.W. 1093 (1901), our Supreme Court, en banc, discussed whether an appropriation act creates a lien on that part of the public treasury's fund that is first appropriated to the end that the whole amount of all prior appropriations shall be in the treasury before any of the subsequent appropriations can be paid. The Court held it need not be. The opinion, speaking of the above and also the sequence of the appropriation act, says:

"But again, section 15, article 10, leaves no doubt whatever as to the intention of the convention. It requires that 'all moneys now or at any time hereafter, in the State Treasury, belonging to the State, shall immediately on receipt thereof be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong in such bank or banks' as may be selected under that section.

"So that it will not do to say that the Constitution requires all revenues of the State to be first paid into one general or common fund and then disbursed in the order named in section 43, article 4, of the Constitution.

"That section simply requires the General Assembly to proceed in that order in passing its appropriation bills.

"It does not follow because the Legislature is required to pursue a specific order in

passing appropriation bills, that it may not provide a tax for a public purpose, and require it to be paid into the Treasury and set apart in a special fund subject to a subsequent appropriation for the purpose for which it was levied, or for that matter, to some other public purpose, when unrestrained by a constitutional limitation.

"In prescribing the order for the passage of the appropriation bills there was no intention to create special liens upon the moneys in the Treasury or give any priority of payment to one appropriation over another.

"We think the purpose of the framers of the Constitution among possibly others, was to prevent an adjournment of the Legislature without making the necessary appropriations for the support of the State Government, and its various educational, penal, and eleemosynary institutions, and the prompt payment of its obligations as they matured, and in this manner prevent extravagant and extraordinary appropriations in excess of the estimated and probable revenues of the State. We can not agree with the learned counsel that the entire income of the State is mortgaged in favor of the various items named in section 43, article 4, of the Constitution, and that the full amount of the appropriation for each purpose must first be collected and set apart before any part of the next in order can be paid. No such construction has ever been given the Constitution or the laws appropriating taxes for various state and county purposes.

"The Constitution does not say that the first money received into the Treasury shall be applied to meet the first item mentioned in said section 43, that no money shall be disbursed on account of a subsequent appropriation until a sufficient amount is accumulated in the Treasury to meet all prior appropriations.

"Such a claim is inconsistent with our whole scheme of taxation. The moneys for the various

institutions and the support of the civil list are never in the Treasury when the Legislature makes the appropriations. A large part of the funds will not reach the Treasury for nearly two years after the appropriations are made. If the contention of the relators should be sustained, the mileage and per diem of the members of the Legislature, and of the various State officials would be postponed until two years after their passage.

"No such interpretation has ever been put upon this section, but the practical construction has been that no such lien or priority was created thereby."

The reasoning there applied to the 1875 Constitution applies equally to the similar provisions of the 1945 Constitution. That part of Section 28 of Article IV of the 1945 Constitution, to wit, "No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made," is for the first time found in the 1945 Constitution and has not been construed by the courts.

The 1875 Constitution, Section 19 of Article X, provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; * * * *"

The 1945 Constitution, different from that of 1875, provides the fiscal year shall be "the twelve months beginning on the first day of July in each year" and that the Legislature may appropriate yearly or biennially as it sees fit.

Section 19 of Article X of the 1875 Constitution provided that payments should be made or a warrant drawn against the appropriation within two years after passage of the appropriation act. In *The State of Missouri ex rel. Blakeman v. Hays*, State Treasurer, 49 Mo. 604, in mandamus to require the re-

spondent to pay a warrant that had been duly audited, the return pleaded, among other defenses, that there was no money in the treasury appropriated to pay it. The court said, l.c. 605:

" * * * * The respondent further denies that there has remained in the treasury, or is now in it, any money appropriated to pay said warrant, or appropriated to said military fund. To this return the relator demurs.

"The treasurer cannot be required to pay out the funds intrusted to his keeping unless appropriated; as the minister of the State, with no discretionary powers, he must disburse when and as, and only when and as, the law-making power shall direct. (Const. Mo., art. XI, Sec. 6.) He usually looks only to the warrant, but is not bound by that if drawn without an appropriation. And if an appropriation lawfully made be exhausted, his payments must necessarily stop. Hence that part of the return denying, in effect, that there is money in the treasury appropriated for the purpose, furnishes a complete excuse for his refusal. * * * *"

In *Nacy v. LePage*, 341 No. 1039, 111 S.W. (2d) 25, our Supreme Court, speaking of the state treasurer, said, l.c. 1041:

" * * * * His duty is to pay out these funds only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated and the subject to which it is to be applied.' * * * *"

In *State v. Weatherby*, 344 No. 348, 129 S.W. (2d) 887 (1939), Division One of the Supreme Court considered the validity of salary payments and the right of the state to recover those illegally paid. The Court held a salary could be lawfully paid out only out of the funds appropriated therefor and that the salary unlawfully paid could be recovered. The point was there made by the defendant that the audit by

the auditor and issuance of a warrant by him was a defense against the state's suit to recover, but the Court denied that contention and said, No. 1.c. 556:

"We think this contention sufficiently answered by our ruling that the instant payments were had upon warrants unauthorizedly drawn against an appropriation not chargeable therewith, and no action by any public official could make them anything else or infuse validity into them."

At page 857 the Court said of the auditor:

" * * * His authorization of unlawful disbursements of public funds is not binding upon the State. * * * "

From the above it will be seen that before any money can be legally paid out of the State Treasury there must first be an appropriation so authorizing (we do not here trace the antecedent steps which are not raised by your inquiry), and the obligation for which payment is to be made must have been incurred prior to "the termination of the fiscal period to which it relates," and the actual payment thereof shall be made within "six months after the end of the period for which made." (1945 Constitution, Section 28 of Article IV.)

The above section states, "and every appropriation shall expire six months after the end of the period for which made." When the appropriation expires," it is dead. Thereafter there is no appropriation at all in the eyes of the law.

If the present Legislature fails to pass an appropriation bill at this session appropriating a fund to be used by the next Legislature, then there will not be any money legally available to pay the expenses of the next Legislature until after the passage of such a bill, and the Constitution, supra, requires as a condition precedent to the passage of such bill that each of the other appropriation bills set out in Section 36 of Article III of the 1945 Constitution, and numbered "First" to "Seventh," inclusive, be first passed.

This course appears not only to be the plain mandate of the Constitution, but it is also based on sound reasoning. The Legislature must use its judgment as to the amount of

money that will be required to operate for the ensuing fiscal period the judicial and executive branches of the State government, and the law contemplates that it should likewise use its judgment as to the amount required to operate the legislative branch. By enacting during the current session the appropriation bill providing the fund for "the expenses of the General Assembly" which succeeds the present session, we know of no constitutional provision that would be thereby violated.

The present Constitution, in Section 23 of Article IV, states that "the general assembly shall make appropriations for one or two fiscal years. If the lawmaking department of the government elects to make the appropriations for one fiscal year, the appropriation act providing for payment of the expenses of the General Assembly will probably be, in the judgment of the Legislature, less than if the appropriations are on the basis of two fiscal years, either of which periods may be adopted by the Legislature. That is a matter entirely within the discretion of the Legislature, but the constitutional requirement as to priority of passage of the various appropriation acts should be followed. If the law-making branch follows the course here above outlined, there will be applied the thought expressed in *State ex rel. v. Henderson, supra*:

"We think the purpose of the framers of the Constitution among possibly others, was to prevent an adjournment of the Legislature without making the necessary appropriations for the support of the State Government, * * * and the prompt payment of its obligations as they matured, and in this manner prevent extravagant and extraordinary appropriations in excess of the estimated and probable revenues of the State. * * *"

Such a course has the additional virtue of providing in a lawful way for the prompt payment of the legislative expenses, and there will then be no need to resort to the practice of passing a resolution and on the strength of such resolution expect or ask the executive officers to advance the money before it has been lawfully appropriated.

We do not understand your inquiry to refer to, nor does this opinion cover, the salary of the members of the General

Honorable R. J. King, Jr. -9-

Assembly because Section 16 of Article III of the 1945 Constitution provides that these salaries shall be paid without a legislative appropriation. Said section provides:

" * * * * upon certification by the president and secretary of the senate and by the speaker and chief clerk of the house of representatives as to the respective members thereof, the state auditor shall audit and the state treasurer shall pay such compensation without legislative enactment. * * * *"

Conclusion.

It is our opinion that the 64th General Assembly does not have the constitutional authority to pass an appropriation act providing for the expenses of the General Assembly until there has been passed each of the other appropriation bills enumerated in Section 36 of Article III of the 1945 Constitution.

We are not sure we understand your second inquiry, but we do not see any legal distinction to be attached to whether the appropriation as now made by the current Legislature for expenses of the succeeding Legislature is considered as supplementary of the appropriation of the present Legislature. Such an appropriation is necessarily a part of the appropriations passed by the present General Assembly for the fiscal term, the length of which may be one or two years, at the election of the Legislature.

Yours truly,

DRAKE WATSON
Assistant Attorney General

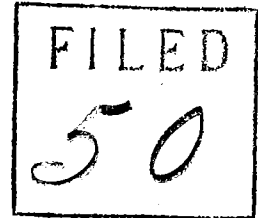
APPROVED:

J. L. TAYLOR
Attorney General

DW:ml

STATE DEPARTMENT OF AGRICULTURE: Commissioner may determine extent of analysis of agricultural seeds.

March 12, 1946



H-H
Mr. J. W. Kuhler
State Seed Supervisor
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for our official opinion, as follows:

"A controversy has arisen in connection with the certificates of the seed testing laboratory of the State Department of Agriculture.

"The controversy turns on whether or not the seed laboratory should include in the certificate the variety name of the seed tested as stated by the grower, or whether the seed should be certified only as to the common name. To illustrate the question: If a person desiring to have seed tested sends in a sample of seed corn and designates it as U. S. Hybrid #13, the Department has never undertaken to certify as to the variety named, but only as to the fact that it is seed corn.

"This opinion is requested in order that we may know whether we do undertake to certify as to the named variety which is sent in, or should certify only in the group name to which the seed belongs."

With your request, you enclosed two forms of the certificate now in use by your laboratory, indicating that you now

certify as to the percentage of germination and the percentage of weed seeds or other foreign seeds. One certificate bears the statement that the laboratory does not verify the varieties of crop seeds.

Article 16, Chapter 102, R. S. Mo. 1939, commonly known as the "Uniform Seed" Law, authorizes an analysis of agricultural and vegetable seeds under the supervision of the Commissioner of Agriculture. Section 14268 of said article provides, in part, as follows:

"Every lot of agricultural seeds, as defined in section 14265 of this article, except as herein otherwise provided, when in bulk, packages, or other containers of one (1) pound or more, shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating:

"(a) Commonly accepted name of such agricultural seeds.

"(b) The approximate percentage by weight of purity; meaning, the freedom of such agricultural seeds from inert matter and from other seeds distinguishable by their appearance.

* * * * *

"(c) The approximate percentage of germination of such agricultural seeds, (including hard seed) the month and year said seeds were tested.

"(f) The percentage of hard seeds. * * * "

Section 14269 makes a similar requirement for all seed mixtures.

Section 14270 provides certain exemptions from the provisions of the Article, but it is not material to a determination of the question involved.

Section 14275 makes a requirement similar to the provisions of Section 14268, supra, relative to the sale of vegetable seed.

An amendment to this law, relating to seed corn, is to be found in Laws of 1941, page 304, and is as follows:

"Section 14279a. No person shall sell, or offer to sell, or expose, or distribute within the State of Missouri any seed of field, sweet or pop-corn, labeled or represented to be hybrid corn, for seed purposes, unless such seed represents the first generation of a control cross involving one, two, three or four different inbred lines of corn or their combinations, and shall be restricted to seed of top crosses, single crosses, three-way crosses and double crosses. These in turn being defined as follows:

"(a) 'Top Cross Hybrid' means the first generation of the controlled cross between an open pollinated corn and an inbred.

"(b) 'Single Cross Hybrid' means the first generation of a controlled cross between two inbred lines.

"(c) 'Three-way Cross Hybrid' means the first generation of a controlled cross between a single cross and an inbred line.

"(d) 'Double Cross Hybrid' means the first generation of a controlled cross between two single crosses.

"The inbred lines shall mean a distinct strain developed through a period of not less than four successive generations of self-pollination. No person, firm or corporation shall sell, or offer to sell, or expose for sale or distribute in the State of Missouri, any hybrids without plainly marking on the label, or on the package, or in the bulk lot the words 'top cross hybrid', 'single cross hybrid', 'three-way cross hybrid' or 'double cross hybrid' as the case may be. Each and every package or bulk lot of hybrid seed corn must be labeled to show, in addition to the information required by the Uniform Seed Law, the name or number by which the hybrid is designated."

Section 14278, R. S. Mo. 1939, makes any violation of the Article a misdemeanor.

The foregoing statutes are clear and unambiguous, and it is considered that no further explanation of their provisions is necessary.

Several additional sections of the Article first above mentioned provide for the enforcement of the laws referred to. Section 14272, R. S. Mo. 1939, empowers the Commissioner to make reasonable rules and regulations to enforce article 16, and provides for the establishment of a laboratory, in the following language:

" * * * Provided further, that the said commissioner shall have authority to maintain a laboratory with necessary equipment within biennial appropriations, and is authorized to assign any of his employees without additional salary to aid in the administration of this article, and shall further be required to secure an analyst or analysts and other necessary employees and designate reasonable remuneration therefor, for the proper enforcement and carrying out of the provisions of this article. It shall be the duty of the said commissioner within his discretion and appropriations to publish or cause to be published the results of the examination, analysis and test of any sample or samples of agricultural seed or mixture of such seed, drawn as provided for in this section, together with any other information said commissioner may find advisable."

Section 14273, R. S. Mo. 1939, sets out the manner in which the Commissioner of Agriculture may obtain samples of agricultural seeds within the state, and is, in part, as follows:

"It shall be the duty of the said commissioner or his authorized agents to inspect, examine and make analysis of and test any agricultural seeds sold, offered or exposed for sale within this state for seeding purposes within this state, at such time and place, and to such extent as said commissioner may determine. * * * " (Emphasis ours.)

The emphasized portion of the last quoted statute obviously vests discretion in the Commissioner of Agriculture as to the number and type of analyses to be made in the laboratory of the department. This position is confirmed by a portion of Section 14279, R. S. Mo. 1939, which is as follows:

"Any citizen of this state shall have the privilege of submitting to the commissioner of agriculture samples of agricultural seeds for test and analysis, subject to such rules and regulations as may be adopted by said commissioner: * * *."
(Emphasis ours.)

We have found no decisions in this state giving judicial interpretation of any of the foregoing sections.

CONCLUSION

Summarizing the foregoing statutory provisions, it is our opinion that the Commissioner of Agriculture may prescribe the form of certificate issued to citizens of this state, and he may omit from such certificate the variety name of the seed analyzed, in his discretion. The Commissioner may also determine the extent of the analysis or test to be made of any seed sold, exposed for sale or submitted to him by any citizen of Missouri.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

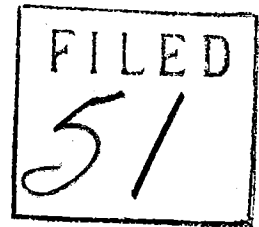
J. E. TAYLOR
Attorney General

RLH:HR

PUBLIC SCHOOL RETIREMENT
SYSTEM:

) Trustee of PSRS appointed by State
) Board of Education who is resident
of school district included in re-
tirement system but not employee
thereof, is qualified to hold that
office.

April 10, 1946



4-12

Mr. Uel W. Lamkin, Trustee
Public School Retirement System
State Teachers College
Maryville, Missouri

Dear Mr. Lamkin:

We heroby acknowledge receipt of your request
for an opinion, which reads as follows:

"The State Board of Education, as
you know, named me to serve on the
Board of Trustees of the Public
School Retirement System of Missouri.
I qualified as prescribed by the
law. Since I qualified, the General
Assembly passed an Act, House Bill
642, which the Governor signed, with
the emergency clause, the effect of
which is to include the Teachers
Colleges of the State, they having
been expressly excluded under the
terms of the original bill.

"My inquiry is as to whether or not
I am still eligible to serve as a
member of the Board of Trustees.

"For your consideration, may I say
that for nearly twenty-five years I
have been employed by the State
Teachers College at Maryville, Mis-
souri.

"That on September 17, 1945 the Board
of Regents, the governing body of the
College, passed Resolution No. 254,
from which the following paragraph is
quoted:

"Resolution #254. In accordance with the previously expressed wish of President Uel W. Lamkin, who has for almost a quarter of century faithfully served the College, that he be relieved and retired from the duties of President, it is deemed by the Board wise and proper that his wishes be granted, and he be relieved from such duties. That he be retired as President Emeritus on a half-time basis, in accordance with the resolution as adopted by the Board at their meeting hold last April 9, 1945. That such retirement to become effective December 1, 1945. That for the present the only duty assigned to him is the completion of the V-12 program and final audit.

"The law, as amended by House Bill No. 642, Sec. 1, provides that

"(3) "Employee" shall be synonymous with the term "teacher" as herein-after defined.'

"(6) "Teacher" shall mean (one)
* * * who shall teach or be employed
* * * on a full time basis, etc.

"(8) "Member" shall mean a person who holds membership in the retirement system.'

"The original Act-H. Bill 151, provided for a Board of Trustees consisting of five persons, two of whom were to be elected by the members of the retirement system and two to be appointed by the State Board of Education. Section 2, (2)

"Section 2, (4) of the Act provided that 'Trustees appointed by the State Board of Education shall be residents of school

districts included in the retirement system, but not employees of such district. Those elected shall be members of the retirement system.'

"Under the definitions cited supra, 'employee' is synonymous with 'teacher.' 'Teacher' is defined as one who is employed 'on a full time basis.' My employment, since December 1, 1945, has been on a half-time basis.

"I am not anxious to stay on the Board. I am willing to do so in order to render service to the schools of the State. But there should be no question as to my eligibility if I do so."

The Board of Trustees of the Public School Retirement System is composed of five members as established by Subsection (2) of Section 2 of House Bill 151, which provides:

"(2) The general administration and the responsibility for the proper operation of the retirement system and for making effective the provisions of this Act are hereby vested in a board of trustees of five persons, as follows: (a) two persons to be appointed as trustees by the State Board of Education; (b) two persons to be elected as trustees by the members of the retirement system; (c) the State Superintendent of Public Schools or Commissioner of Education who shall serve as trustee by virtue of his office."

Your request informs us that you were appointed by the State Board of Education. We believe the pertinent part of House Bill 151 in that instance to be Subsection (4) of Section 2 thereof, which states:

"(4) Trustees appointed by the State Board of Education shall be residents of school districts included in the retirement system, but not employees

Mr. Uel W. Lamkin, Trustee - 4

of such districts. Those elected shall be members of the retirement system." (Underscoring ours.)

House Bill 642, to which you refer, undertakes to define certain terms used throughout House Bill 151 but it does not establish the prerequisites to becoming a member of the Board of Trustees as an appointee of the State Board of Education.

With reference to Subsection (4) of Section 2, supra, you are a resident of the "school district included in the retirement system" and are not an employee of such district, which we believe satisfies the qualifications set out in the last mentioned subsection.

Conclusion

It is, therefore, the opinion of this department that under Subsection (4) of Section 2 of House Bill 151, one who is a resident of a school district but not an employee of such district is qualified to be appointed by the State Board of Education as a Trustee of the Public School Retirement System.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

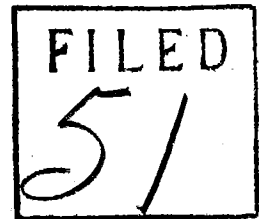
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

SCHOOLS: Paragraph 4, Section 10029, R. S. Mo. 1939, does not give the Board of Nurse Examiners any power or control
NURSES: over schools and classes of nursing not accredited or registered.

July 20, 1946



Miss Laura Layher, R. N.
Executive Secretary
Missouri State Board of Nurse Examiners
Jefferson City, Missouri

Dear Madam:

Receipt is acknowledged of your letter in which an official opinion was requested of the Attorney General. Your letter reads as follows:

"The State Board of Nurse Examiners desires the opinion of the Attorney-General on the interpretation of the Nurse Practice Act, June 9, 1939, Section 10029, Subdivision 4, Page 4,

"The Board is especially interested in Subdivision 4, Page 4 of the law as it pertains to the inspection of 'all schools and classes of nursing in the State' and the Board desires to know what powers it has to exercise over 'schools and classes of nursing in the State' which it does not accredit or register and whose curriculum and standards it does not outline and recommend."

The question contained in your request is: "What control does the State Board of Nurse Examiners have over schools and classes of nursing in the State which it does not accredit or register under the provisions of Paragraph 4, Section 10029, R. S. Mo. 1939?"

The Nurse Practice Act, incorporated as Chapter 61 in the Revised Statutes of Missouri, 1939, establishes a State Board of Nurse Examiners, and empowers that Board to accredit and register schools of nursing which apply for registration, adopt and appoint the curricula and standards to be followed by schools that the Board accredits and registers, and to examine and license applicants to practice as nurses who meet the prescribed qualifications.

Section 10029 sets out the powers and duties of the officers of the Board of Nurse Examiners. However, Paragraph 4 pertains to the powers and duties of the Board itself, and further, provides for the employment of an inspector and educational director, and prescribes her duties. Paragraph 4, Section 10029, reads as follows:

"4. The board shall outline and recommend curricula and standards to be followed by such schools of nursing as the board shall accredit and register; shall inspect all schools and classes of nursing in the State; shall advise with and make recommendations to the directors of schools of nursing conducting schools or classes in the State as to courses and methods of theoretical and practical instruction and standards; shall employ and fix the compensation of a qualified person licensed as a registered nurse under this article as inspector and educational director to act as chief examiner in the preparation of questions and grading of examination papers, and to inspect all schools and classes of nursing in the State, and to report to the board her findings and recommendations, such inspector to have no further authority except to report her findings to the board and to perform such other duties as may be provided by the provisions of this chapter not inconsistent with the general law." (Emphasis ours)

Under Paragraph 4, supra, certain functions of the Board are listed. It is stated that "the Board shall outline and recommend curricula and standards to be followed by such schools of nursing as the board shall accredit and register." This provision gives the Board considerable power to regulate the operation of certain schools by permitting it to prescribe the standards and establish the curricula for such schools. However, it is significant that such control is clearly limited to schools accredited and registered by the Board, and it appears that the legislature was silent in empowering the Board to exercise the same degree of control over other schools of nursing not accredited and registered by the Board.

In construing Section 10029, supra, it is necessary that we consider and give effect to other statutes relating to the same subject matter. *Whalen v. Buchanan County*, 111 S. W. (2d) 177, 342 Mo. 33.

Section 10028, R. S. Mo. 1939, which also pertains to the

duties of the Board of Nurse Examiners, in part, provides:

"The Board shall make rules and regulations not inconsistent with this chapter and the general laws that govern its proceedings; shall adopt a seal; shall establish a system of inspection of schools of nursing in Missouri; shall adopt and appoint curricula and standards to be followed by schools of nursing as shall wish to be accredited by and shall apply for registration with the board; shall register as accredited such schools as shall meet the requirements of board as to courses, standards and management and pay to the board an annual fee of fifteen dollars (\$15.00); * * *" (Emphasis ours)

Under this section the Board may require schools desiring to become accredited and registered to comply with the standards and curricula adopted and appointed by the Board. However, the Board's power over such schools is limited to denying them registration as an accredited school should they not possess the qualifications required by the Board. The Board, under this section, exercises no other control over the operation of schools not accredited or registered.

In connection with the two sections cited, attention is directed to Section 10034, R. S. Mo. 1939, which, in part, provides:

"The Board shall admit to examination for license to practice as a nurse any applicant who shall pay a fee of ten dollars (\$10.00) and shall submit to the Board satisfactory written evidence, verified by oath, if required, that said applicant:

* * * * *

"4. Has since the year 1927 graduated from an accredited school of nursing giving a three-year course of instruction, (or has graduated previous to 1927 from an accredited school of nursing giving at least a two-year course of instruction), in which course of instruction the theory taught shall have been proportioned to practice in a hospital to the satisfaction of the board. * * *"

Under this section the only persons who are permitted to take the examination for a license to practice nursing are those possessing certain qualifications, among which they must have graduated from an accredited school of nursing. This could only mean schools which have been accredited and registered by the Board and which possess the standards and curricula adopted and appointed by the Board.

It, therefore, seems that the Board of Nurse Examiners should only be concerned with schools of nursing in the State which have been accredited and registered by the Board, or those which desire to become accredited and registered, and have submitted the necessary applications.

Section 10028, supra, further provides that the Board shall establish a system of inspection of schools of nursing in Missouri, and in this connection Section 10029, Par. 4, supra, further provides that the Board shall inspect schools and classes of nursing.

The word "inspect" is defined in Volume 44, C. J. S., p.395, as follows:

"A term in common use, having a well defined and generally understood meaning, and defined as to examine for the purpose of determining quality, detecting what is wrong, and the like; to examine, to view closely and critically, especially in order to ascertain quality and condition, to detect errors, etc.; * * *"

Since the Board is only empowered to adopt and appoint the standards and curricula of schools which it accredits and registers, and to require schools desiring to become accredited and registered to meet such standards and curricula, its authority to inspect schools must fall within the ambit of its power to control schools of nursing. Consequently, the Board of Nurse Examiners can only inspect schools of nursing within the State which it has accredited and registered, or which may desire to become accredited and registered, and have made proper application therefor.

There is no provision in the Nurse Practice Act which gives the Board of Nurse Examiners the right to adopt and appoint standards and curricula, inspect or in any way control the operations of schools of nursing in the State which it has not accredited and registered, or which have not applied for registration.

In the case of Sayles v. Kansas City Structural Steel Co., 128 S. W. (2d) 1046, 344 Mo. 757, the court said at S. W. 1.c. 1051:

"Statutes are to be construed, if possible, so as to harmonize and give effect to all of their provisions, Gasconade County v. Gordon, 241 Mo. 569, 145 S. W. 1160, and provisions not therein found plainly written or necessarily implied from what is written will not be imparted or interpolated therein in order that the existence

of such right may be made to appear when otherwise, upon the face of said act, it would not appear.' * * *"

CONCLUSION

It is, therefore, the opinion of this department that under the provisions of Paragraph 4, Section 10029, Chapter 61, R. S. Mo. 1939, the State Board of Nurse Examiners is specifically limited in its power to adopt and appoint the standards and curricula of schools and classes of nursing to those which are accredited and registered by the Board. Under Section 10028, R. S. Mo. 1939, the Board may require schools and classes of nursing which have applied for registration to match the standards and curricula which it prescribes. The provision empowering the Board to inspect schools and classes of nursing is only applicable to schools and classes which it has accredited and registered, or which have made application for registration.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

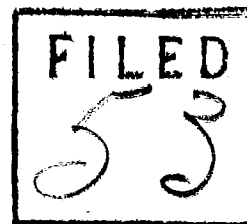
APPROVED:

J. E. TAYLOR
Attorney General

RFT:DC

26
26
Mr. John Smith
SCHOOLS: Interpretation of the meaning of "actual and necessary traveling expenses" as applied to county superintendent of schools.

June 25, 1946



Honorable Harry T. Limerick, Jr.
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter requesting an opinion of this department, as follows:

"Senate Committee Substitute for Senate Bill No. 41 passed by the Sixty-third General Assembly pertained to travel allowance for the office of County Superintendent of Schools.

"House Committee Substitutes for House Bills No. 771, No. 770, and No. 916, retained the same wording for counties of the fourth class, third class, and first class respectively, with House Bill No. 900 pending for counties of the second class.

"What is meant by the phrase 'actual and necessary traveling expenses'? Does it include lodging and meals?

"Would it permit payment of traveling expenses to professional meetings which the county superintendent would properly be expected to attend?"

Your letter presents two distinct questions for opinion. First, is lodging and meals a part of "actual and necessary traveling expenses" of a county superintendent of schools; and, second, is the county superintendent of schools entitled to reimbursement under the above quotation in attending professional meetings? This opinion will take each up separately in the order presented.

We have been unable to find any cases in this jurisdiction that have construed the meaning of the phrase "actual and necessary traveling expenses" so it will be necessary that we not only look to the courts of our state, but also to the courts of other states, for the answer to our first question.

In the New Mexico case of State ex rel. Scott, Dist. Atty., v. McClure, et al., District Judges, 143 Pac. 477, a District Attorney was attempting to collect reimbursement for board and lodging while in the discharge of official duties. A New Mexico statute provided "that the actual traveling expenses of district attorneys, incurred while in the discharge of their duties, shall be paid by the county * * *." The Supreme Court of New Mexico held, at l. c. 478:

"* * * We are clearly of the opinion that such items are proper charges against the several counties, when the same arise by reason of necessity of the district attorney's traveling upon public business of the counties against whom the charge is made. * * * * *"

In the case of State ex rel. Tim Birmingham v. George Hackmann, State Auditor, 276 Mo. 504, the court did construe the meaning of the words "all necessary traveling expenses." Here the State Game and Fish Commissioner attempted to collect for hotel bills while discharging his official duties away from his residence, but the State Auditor refused to pay him, saying that the hotel bills should not be included under the phrase "all necessary traveling expenses." In holding that the State Auditor should pay these hotel bills the court states, at l. c. 508:

"* * * But as it is there is absolutely no excuse for the refusal to audit and allow these expenses, which are amply provided for both by the law creating the office and prescribing the duties, and the Appropriations Act covering the expense of the office.

"A case as plain as this should have been disposed of without recourse to the courts. * * * * *"

It might be argued that "traveling expenses " refer to expenses only incurred for a manner of conveyance, and must be strictly construed in favor of the state. This question was answered in the California case of Corbett v. State Board of Control, et al., 204 Pac. 823, where the court states, at l. c. 824:

"If the meaning of the phrase 'traveling expenses' prevents its application to anything except expenses paid for some kind of locomotion or conveyance, doubtless this interpretation might be sustained. But it is a familiar rule of statutory interpretation that words and phrases are construed according to the approved usage of the language, and that words of common use are to be taken in their ordinary and general sense. Gross v. Fowler, 21 Cal. 396; Pol. Code, Sec. 16. Ever since the year 1878 the law has provided that the members of the Supreme Court shall be allowed their 'actual traveling expenses' in going to and from their respective places of residence to attend the sessions of the court. It has been the universal practice for that period to allow the members and officers of that court, not only their railroad fare, but also their hotel bills during the time of their attendance on the sessions. The phrase quoted has always been understood to include these expenses. * * * * *

From what has been said above, it seems very clear to us that the phrase, "actual and necessary traveling expenses" would include board and lodging in addition to actual expenses for a manner of conveyance from the place of the statutory business office to the place that one must go to discharge his official duties.

It has long been held by the courts of this state that before a public officer, claiming compensation or fees for official duties performed, may receive payment for same he must point out the statute authorizing such payment. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. (2d) 857; Ward v. Christian County, 341 Mo. 1115, 111 S.W. (2d) 182.

The courts of our state have considered interpretation of statutes by public officers charged with their execution as a factor in determining the intention of the General Assembly. State ex rel. Barrett v. First National Bank, 297 Mo. 397, 249 S.W. 619. Public officers are expected to attend certain professional meetings in order that they might increase their knowledge of the affairs which may come to their official attention, and, in so doing better serve the public. We assume it is this type of meeting you are referring to in your letter in addition to those meetings that are specifically set out in Article 14, Chapter 72, R. S. Mo. 1939. In the California case of Corbett v. State Board of Control, et al., supra, the Supreme Court said it was the universal practice by the state to allow hotel bills as a part of traveling expenses, and, since "words and phrases are construed according to the approved usage of the language" the Legislature intended for the hotel bills to be a part of traveling expenses. Following the same reasoning, the General Assembly of Missouri, knowing that public officers have been collecting traveling expenses for the type of meetings mentioned above, did not attempt to limit the traveling expenses of the county superintendent of schools in House Bills Nos. 771, 770 and 916, House Bill No. 900 in its perfected form as of this date, or Senate Bill No. 41. So, therefore, we should construe the language of these bills according to the approved usage and allow the County Superintendent of Schools actual and necessary traveling expenses to meetings that have been deemed proper to attend by past practice.

Conclusion

Therefore, it is the opinion of this department (1) that the county superintendent of schools, in collecting his "actual and necessary traveling expenses" as provided by House Bills Nos. 771, 770 and 916, House Bill No. 900 in its perfected form as of this date, or Senate Bill No. 41, may collect for board and lodging in addition to his actual expenses for conveyance; and (2) that he may be reimbursed for his "actual and necessary traveling expenses" for those meetings that it is necessary for him to attend.

Respectfully submitted,

APPROVED:

PERSHING WILSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

PW:CP

AFFIDAVITS:

An attorney-in-fact may not swear to the registration and anti-trust affidavit of a corporation under Sec. 119, page 472, Laws of Mo., 1943. Exception found in this section not applicable under the facts presented.

January 3, 1946

FILED

56

Mr. Russell Maloney
Corporation Supervisor
Office of Secretary of State
Jefferson City, Missouri

Dear Sir:

Receipt of your request for an opinion is hereby acknowledged, which reads as follows:

"Mr. L. R. Gifford has presented the annual report and anti-trust affidavit of the O. K. Harry Steel Company, a Missouri corporation, and the company's check in the sum of \$40.00, the fee for filing such instruments in the month of December. Both reports are sworn to by L. R. Gifford as Attorney-In-Fact and I have enclosed photostatic copy of the instrument which purports to clothe Mr. Gifford with authority to execute the annual report and anti-trust affidavit.

"Section 119, page 442, Laws of Missouri 1943, in substance provides that these instruments shall be sworn to by the President, Vice-President, the Secretary or Treasurer of the corporation. Since this section has been the law we have required the signatures of one of the above designated officers. We are informed that this corporation is more or less defunct and the only remaining officer, the President, has moved away and has refused to respond to the request that she execute the affidavits. It is stated that very little, if any, assets remain and in due course of time the corporation will be dissolved, however, there are some assets that will need to be transferred to the

new corporation and for that reason they wish to keep the existing corporation in good standing.

"It would seem that it was not the purpose of the Legislature to hamper the filing of these reports, but rather to encourage such filings. I would, therefore, appreciate an opinion on this subject at the earliest possible date as we have agreed to hold the fully executed 1945 annual report and anti-trust affidavit awaiting your opinion."

We note that Section 119 referred to in your letter is to be found on page 472, Laws of Missouri, 1943, and provides that,

"The registration and anti-trust affidavit in this Act required shall be sworn to before any officer having a seal authorized to administer oaths, by the president, a vice-president, the secretary or treasurer of such corporation. Whenever any corporation is in the hands of an assignee or receiver, it shall be the duty of such assignee or receiver, or one of them, if there be more than one, to register such corporation and otherwise comply with the requirements of this Act."

It is true that anti-trust legislation is enacted for the protection of the public and when public rights are involved it is proper to construe such legislation liberally in favor of the public and against trusts and combines. However, as is held in the case of Toledo P. & W. R. R. v. Stover, 60 Fed. Supp. 587, 1. c. 583:

"A statute which directs performance of a certain thing in a certain manner, bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person."

A similar rule stated by the United States Supreme Court in the case of Botany Worsted Mills v. United States, 278 U. S.

232, 239, 49 Sup. Ct. 129, 132, 73 Law Ed. 379, holds:

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh etc., R. R. Co. v. Reid, 13 Wall. 269, 270, 20 Law Ed. 570; Scott v. Ford, 52 Ore. 288, 296, 97 P. 99."

This is but another way of stating the well-known rule that "the expression of one thing is the exclusion of another," as found most recently in the case of State v. Smith, 111 S. W. (2d) 513, 1. c. 514.

In the present situation we have a statute which directs the performance of a certain thing in a particular manner, that is, that the registration and anti-trust affidavit shall be sworn to by the president, a vice-president, the secretary or treasurer of a corporation and such provision bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person.

Although we feel that the principal question has been covered by the foregoing it is well to note the exception in Section 119, page 472, Laws of Missouri, 1943, supra, concerning the duty of an assignee or receiver of a corporation "to register such corporation and otherwise comply with the requirements of this Act."

We are informed by your letter that the present corporation has not been dissolved. In the absence of a statement or showing that there has been an assignment or that the corporation is in receivership there can be no application of the rule presented by the exception noted. Mr. L. R. Gifford is not identified as one of the required officers of the corporation nor as an assignee or receiver but rather as an attorney-in-fact with stipulated powers concerning the management of the affairs of the company, among which stipulated powers is not to be found the authority to swear to the registration and anti-trust affidavit.

Conclusion

We are, therefore, of the opinion that Section 119, page 472, Laws of Missouri, 1943, requires the president, a vice-president, the secretary or treasurer of a corporation to swear to the registration and anti-trust affidavit of the corporation

Mr. Russell Maloney - 4

and an attorney-in-fact may not be substituted to execute such instruments.

We are of the further opinion that the facts presented do not bring this corporation within the exception found in Section 119, page 472, Laws of Missouri, 1943, whereby an assignee or receiver of a corporation is authorized to register such corporation and otherwise comply with the requirements of this Act.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

CRIMES AND PUNISHMENTS: Obtaining money by false pretenses; oppression in office; exacting illegal fees by sheriff; officer accepting bribe.

February 28, 1946



3-1

Honorable Russell Mallett
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the following facts:

"A Grand Jury has been called in Jasper County for the purpose of investigating reports about our sheriff and his deputies victimizing inmates of the County Jail, some of whom have been sent to the penitentiary. Numerous rumors have come back to us that prisoners who have been kept in the County Jail have stated that they were victimized by the Sheriff or his deputies and it is reported by rumors only, as far as I am concerned, a great many convicts have made those statements.

* * * * *

"The nature of the complaints that have come to me are:

"1. That the Sheriff exacted large sums of money from the prisoners promising that he would get them paroles.

"2. That the Sheriff and his jailers have been charging fees to permit prisoners to leave cells and to get

into the bullpen where they have more freedom and better quarters and charging them additional fees for being trusty where the accomodations are still better.

"I would like for you to submit to me an opinion as to what is the best and most severe charge that could be returned in an indictment against the Sheriff and his deputies in case the Grand Jury sees fit to indict them.

* * * * *

It is our opinion that complaint No. 1 could be prosecuted under Section 4437, R.S.A., which is the section making the obtaining of money or goods by false pretenses a crime. Said section is in part as follows:

"Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, * * * * * obtain from any person any money, personal property, right in action or other valuable thing or effects whatsoever, * * * * * shall upon conviction thereof be punished in the same manner and to the same extent as for feloniously stealing the money, property or thing so obtained."

The Supreme Court of Missouri, in the case of State vs. Wren, 333 Mo. 575, held that a similar offense was covered by this statute. In this case the indictment charged that the defendant obtained money by promising the victim that he would get him a position on the police force for a consideration of \$175. The court, in holding the indictment sufficient, said at l.c. 578:

"The indictment is drawn under Section 4095, Revised Statutes 1929 (4 Mo. Stat. Ann. p. 2894), making it a crime

for any person, with intent to cheat or defraud another, designedly, by any false token or writing, or by any other false pretense, to obtain from any person money or property. The false pretense, to come within the statute, must be as to an existing or past fact, not a promise as to something to take place in the future. * * * * *

* * * * *

" * * * * The indictment further charges that defendant represented that if Woods would pay him \$175 he would have him put in the next school of instruction and get him on the police force, thereby implying and giving Woods to understand that he had sufficient influence or power to do so, * * * *

* * * * *

"In our opinion the indictment in this case charges facts sufficient to constitute an offense under the statute and the fact that coupled with the alleged false pretenses as to existing facts there is an allegation of a promise to be carried out in the future does not invalidate the indictment."

In dealing with the question of the sufficiency of the false pretenses or representations in the Wren case, the court said at l.c. 581:

"In the motion to quash there is the further assignment that the indictment is so vague and indefinite as not to advise defendant of the charge preferred against him. Defendant has not briefed this point. If it means that the alleged false representations are not stated with sufficient definiteness the answer is they are, presumably, set out as defendant made them, that being necessary in order to

avoid variance between allegation and proof. If defendant was not as specific in his statements to Woods as he might have been it hardly lies in his mouth to complain because his victim did not require of him a more specific false pretense. It was sufficiently specific to induce in Woods' mind the understanding and belief it was designed to produce and to get Woods' money. * * * *

In view of the holding in the Wren case, the defendant could be prosecuted under the facts set out in complaint No. 1, if the representation was made in such a way as to lead the victim to believe the defendant could obtain a parole for him and upon the strength of such representation and belief gave the defendant his money or property.

The punishment for the above offense would depend upon the amount of money obtained by the defendant. If it was under \$30, Section 4469, R.S.A., defining petty larceny and its punishment, would apply. If the amount obtained was over \$30, Section 4456, R.S.A., defining grand larceny, and Section 4457, R.S.A., defining the punishment for grand larceny, would be applicable.

It is our opinion that complaint No. 2 could be prosecuted under Section 4339, R.S.A., titled "Oppression in office," which is as follows:

"Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Also, under Section 4342, R.S.A., titled "Exacting illegal fees," which is as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or

reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

The penalty for violating Section 4339, supra, is provided in Sections 4341 and 4344, R.S.A., which are as follows:

Section 4341.

"Every person who shall be convicted of any of the offenses mentioned in the preceding sections of this article shall be forever disqualified from holding any office of honor, trust or profit under the Constitution and laws of this state, and from voting at any election; and every officer who shall be convicted of any official misdemeanor or misconduct in office, or of any offense which is by this or any other statute punishable by disqualification to hold office, shall, in addition to the other punishment prescribed for such offenses, forfeit his office."

Section 4344.

"Every officer or person holding any trust or appointment, who shall be convicted of any willful misconduct or misdemeanor in office, or neglect to perform any duty enjoined on him by law, where no special provision is made for the punishment of such misdemeanor, misconduct or negligence, shall be punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

The penalty for violating Section 4342, R.S.A., is set out in Section 4344, supra.

We have been unable to find a case exactly in point under either of these two statutes, but in the case of State vs. Latshaw, 63 Mo. App. 620, the court discussed the section on oppression in office. The facts in this case disclose that the defendant was a justice of the peace and illegally charged certain defendants in criminal cases fees which were illegal and not prescribed by statute, coupled with the threat that if the fees were not paid the defendants would be committed to jail, and if paid they would be discharged. The justice of the peace had been charged with obtaining money by false pretenses and the appellate court held that the proper charge would have been oppression in office.

It is also our opinion that the acts enumerated under complaint No. 2 could be prosecuted under Section 4324, R. S. Mo. 1939, which pertinent parts are as follows:

" * * * * and any other public officer of this state, or of any county or city, town or township thereof, who shall, directly or indirectly, accept or receive any gift, consideration, gratuity or reward, or any promise or undertaking to make the same: First, under any agreement that his vote, * * * * or that he shall neglect or omit to perform any official duty, or perform the same with partiality or favor, or otherwise than according to law; * * * * shall be deemed guilty of bribery, and punished as prescribed in the next preceding section."

Punishment for the above offense is prescribed by Section 4325 R. S. Mo. 1939, and said section provides for imprisonment in the penitentiary for a term not exceeding seven years.

In the case of State v. Adcox, 278 S.W. 990, 1.c. 991, the court defined the offense covered by this statute when it said:

"In order to constitute bribery of an official, under section 3177, the bribe must have been in order 'to induce him (the officer) to neglect or omit the performance of any official duty, or to perform such duty with partiality or favor, or otherwise than

is required by law.' No other language in that section can possibly be construed to apply to the act here charged. The general rule, laid down in Corpus Juris, vol. 9, p. 404, is as follows:

"In order to bribe an officer, he must be in the discharge of a legal or official duty; in other words, there can be no bribery of any official to do a particular act, unless the law requires or imposes upon him the duty of acting. A moral duty is insufficient.'

"In case of State v. Butler, 178 Mo. loc. cit. 319, 77 S.W. 572, this court said, in relation to the bribery of an official:

"The very purpose of the statute is to prevent public officials from being influenced in respect to questions upon which they are authorized to act. How can an officer be influenced to act, when there is no law requiring him to do so, and no power under the law authorizing him to act?'"

The statutory duty of the sheriff or jailer, as to the operation and custody of the jail and the prisoners therein, is provided by Section 9195, R.S.A., and is as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

The Adcox case, supra, holds that the offense must have been in connection with the performance of any official duty,

Honorable Russell Hallett

-8-

and the statute covers the administering of this duty with partiality occasioned by a bribe. Therefore, it is our opinion that when the sheriff or jailer administered the duties set out in Section 9195, supra, with partiality, because of having been paid a bribe by an inmate of his jail, he could be prosecuted under Section 4324, supra, for the crime of accepting a bribe.

Conclusion.

It is the opinion of this department that, under the facts stated in your request, the defendant could be prosecuted for obtaining money by false pretenses under complaint No. 1, and that he could be prosecuted either for oppression in office, exacting illegal fees or accepting a bribe under complaint No. 2.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

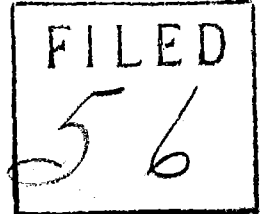
APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

OFFICERS: The Assessor and Coroner of Jasper County shall be paid according to the Laws of the 63rd General Assembly after July 1, 1946; members of the County Court and the County Clerk of Jasper County shall be paid according to the Revised Statutes of Missouri of 1939, during their present term.

October 8, 1946



Honorable Russell Mallett
Prosecuting Attorney
Jasper County
324-5-6 Miners Bank Building
Joplin, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department, which reads as follows:

"Section 13 of Article 7 of the new Constitution provides 'The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.'

"Under the new Constitution and the present Statutes the Assessor, Members of the County Court, County Clerk, Court Reporters, Circuit Judges, Sheriff and Coroner of Jasper County, Missouri are entitled to increased compensation above that which was paid when they obtained their respective offices.

"Will you please render me an opinion on the above officers as to whether or not they are entitled to increased compensation as provided by the new Constitution and Statutes as of July 1, 1946."

An opinion relating to Court Reporters and Circuit Judges has been prepared by this office and a copy will be forwarded to you with this opinion.

We will discuss first the offices of Assessor and Coroner. The Assessor received compensation from fees collected under Section 10996, R. S. Mo. 1939, and other related statutes. The Coroner received compensation from fees collected under Section 13424, R. S. Mo. 1939, and other related statutes.

Section 13450, R. S. Mo. 1939, provides:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants or more. After the first day of January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Therefore, under the Revised Statutes of Missouri of 1939 the maximum compensation allowed these officers was \$5,000.00.

Under the Constitution of 1945, and the laws passed by the 63rd General Assembly, their compensation has been changed so that now the County Assessor is paid \$5,000.00 per annum, as provided by House Bill No. 889; the Coroner is paid \$2,000.00 per annum, as provided by House Bill No. 896.

This presents the question that if the facts show that the above officers actually collected fees of a less amount than the salaries that are now provided for by the new laws, should this be treated as an increase in their compensation during their present term under Section 13, Article VII of the Constitution of 1945, which provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This question was raised in the case of State ex rel. Emmons v. Farmer, 196 S.W.1106, 271 Mo. 306. Although this case was decided under Section 8, Article XIV of the Constitution of 1875, this section is the same in substance as Section 13, Article VII of the Constitution of 1945. The court said, at l. c. 314, 316 and 317:

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the Act of 1915, does not exceed but exactly equals the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2000 yearly cash salary, the provisions of the Act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term.

"So, while it is conceded as the figures indicate, that there has been no increase in the stated amount fixed by law as the pay of a circuit clerk during the current term of this relator, yet it is urged there has been an increase in fact, unless the fees collected each year amount to as much as \$2000, regardless of the statutory provision existing when relator took office of retaining as his annual compensation \$2000 out of the fees earned and collected.

"The Act of 1915 putting circuit clerks upon a salary basis, was, it is plain, designedly

enacted so that the several salaries fixed thereby and made payable monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the Act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from twenty-five to thirty thousand population would get the salary fixed by the Act of 1915 some years, and get fees other years, and it would be impossible ever to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it (*State v. Baskowitz*, 250 Mo. 82); the other is that where one construction of a statute would render the act absurd and unenforceable and the other the converse, we are required to adopt the latter rather than the former. (*State ex rel. v. Gordon*, 266 Mo. 1. c. 411.)

* * * * *

"We are constrained therefore to hold that the Act of 1913 (Laws 1913, p. 702) fixed

the basic compensation for clerks of the circuit courts and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations, constitute the salaries from which we are to determine whether the Act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question and conclude that as to the relator there has been no increase and the act is constitutional. Let the judgment of the learned judge nisi be affirmed.* * *

This, we believe, clearly answers our question as to what the compensation of these officers were before July 1, 1946, when considering the constitutional prohibition of raising an officer's salary during his term. In this case the court even goes so far as to assume that the officer did not receive compensation equal to his new salary, but said that since the maximum set by statute is the same as the new salary, that this was sufficient to comply with the Constitution. Therefore, we believe this case would be controlling as to the office of Assessor and Coroner of Jasper County, and, since the salaries under the laws passed by the 63rd General Assembly are less or equal to \$5,000 there would not be an increase during their present term, under Section 13, Article VII of the Constitution of 1945.

At the present time, this office is preparing a separate opinion with regards to the compensation of the Sheriff of Jasper County which will be forwarded to you at a later date.

There remains the final question of whether the members of the County Court and the County Clerk of Jasper County should be paid under the Revised Statutes of Missouri of 1939 or under the laws passed by the 63rd General Assembly. Section 2494, R. S. Mo. 1939, provides for an annual salary of \$2500.00 for the members of the County Court of Jasper County, while House Bill No. 894 of the 63rd General Assembly, provides for an annual salary of \$3600.00. Section 13433, R. S. Mo. 1939, provides for an annual salary of \$3000.00 for the County Clerk, while House Bill No. 895 of the 63rd General Assembly, provides for an annual salary of \$4000.00. These clearly are increases in compensation during their present term, and would be so considered under Section 13, Article VII of the Constitution of 1945. Since there are no additional duties imposed upon the County Judges or the County Clerk of Jasper County, we are of

Hon. Russell Mallett

(6)

the opinion that the members of the County Court will continue to receive compensation as provided by Section 2494, R. S. Mo. 1939, during their present term of office, and the County Clerk will continue to receive compensation as provided by Section 13433, R. S. Mo. 1939, during his present term of office.

CONCLUSION

Therefore, it is the opinion of this department that:

(1) In Jasper County the Assessor shall be paid according to House Bill No. 889 of the 63rd General Assembly, and the Coroner shall be paid according to House Bill No. 896 of the 63rd General Assembly;

(2) Members of the County Court, during their present term, shall be paid according to Section 2494, R. S. Mo. 1939, and the County Clerk shall be paid according to Section 13433, R. S. Mo. 1939.

Respectfully submitted,

PERASHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

PROBATE JUDGE: [REDACTED] to practice law after present

March 28, 1946

FILED

57

H-4
Honorable W. V. Mayse
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Mr. Mayse:

This will acknowledge your letter requesting an opinion from this Department, whether a lawyer in a county of less than 30,000 population may hold the office of Probate Judge, and continue to practice law if he is not the present office holder of the Probate office.

Your letter states:

"I would appreciate very much getting an opinion from your office on the construction of Section 24, Article 5 of the New Constitution of Missouri with regard to the specific question of whether or not a lawyer in a county of less than 30,000 population can hold the office of Probate Judge and continue to practice law if he is not the present office holder of the Probate office.

"I would appreciate your opinion at your very earliest convenience due to the fact that it may influence the decision of an attorney of our county as to whether or not he will file for the office of Probate Judge."

It would seem that an answer to the question you submit would not be difficult.

Section 24 of Article V of the new Constitution of this State, under the subject of "Judicial Department"

March 28, 1946

is so plain and unambiguous that there should be no debate or controversy respecting the right of a Judge of the Probate Court to practice law.

The question of population mentioned in your letter has nothing to do with the question propounded.

Section 18, Article V of the present Constitution of this State does designate that in counties of the State of Missouri, having 30,000 inhabitants or less, the Probate Judge shall be Judge of the Magistrate Court. But said Section 18 does not undertake to prescribe the right of an occupant of the Probate Judge's office to practice law. That question, we believe, is entirely settled by the terms of Section 24, Article V of the present Constitution of this State, which is as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

That part of said Section 24, Article V of the present Constitution which states:

"* * * No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. * * *".

Honorable W. V. Mayse

-3-

March 28, 1946

is quite plain, we believe, in effect, that no judge, either of a Probate Court, or any other Court, may practice law, except that it does provide Probate Judges during their present terms of office may practice law. We believe the meaning and the only reasonable construction and interpretation to be placed upon that clause of said Section 24, of Article V of the New Constitution is that after the present term of office of any Probate Judge in this State has expired he, if re-elected, or if perchance, the occupant of the Probate office be a newly elected official, neither one or the other may practice law.

CONCLUSION.

It is, therefore, the opinion of this Department that "a lawyer in a county of less than 30,000 population" may not, under the terms of Section 24, Article V of the present Constitution of this State, hold the office of Probate Judge and continue to practice law if he is not the present office holder of the Probate office.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

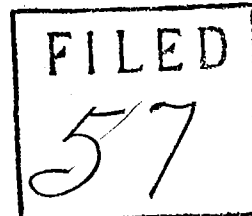
APPROVED:

J. E. TAYLOR
Attorney General

GWC:lr

CONSTITUTIONAL LAW: Under Section 25, Article V, Missouri
PROBATE JUDGE: Constitution 1945, incumbent probate judge
cannot succeed himself if not in office
when Constitution was adopted, unless
licensed to practice law.

April 11, 1946



6/3
Honorable Gordon J. Massey
Lawyer
Third Floor Courthouse
Ozark, Missouri

Dear Sir:

Receipt is acknowledged of your letter in which you requested to be advised if the incumbent probate judge would be eligible for the combined office of probate judge and magistrate.

Your letter reads as follows:

"Hon. W. L. Hixson is the present probate judge of this county he having been appointed by the Governor in November 1945 to finish the unexpired term of the Judge who resigned. Mr. Hixson took charge of the office December 1, 1945.

"Please advise me whether or not Mr. Hixson is eligible to fill the combined office of Magistrate and Probate Judge under the provisions of the new constitution and laws passed affecting said office."

Section 18, Article V, of the Constitution of Missouri of 1945, provides in part:

"* * * In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. * * *"

The effect of this section is to combine the offices of probate judge and judge of the magistrate court and it requires that the combined offices shall be held by one person, who shall be the probate judge. Consequently, in the instant case, for Mr. Hixson to be eligible for the combined office of probate judge

and magistrate he must be qualified for the office of probate judge.

We assume that your inquiry has partly been prompted by the fact that Mr. Nixson is not now licensed to practice law in Missouri. Were he so licensed, there would be no question as to his eligibility, because he undoubtedly fulfills the voting, residence and age requirements.

Section 25, Article V, of the Constitution of Missouri of 1945, provides for the qualifications for probate judge, and, in part, reads as follows:

"* * * Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, * * * * *"

(Emphasis ours.)

This section in clear and unambiguous language requires a person to be licensed to practice law in this state to be eligible for the office of probate judge. However, the exception to this requirement is that the incumbent probate judge may succeed himself without being so licensed.

According to your letter, the incumbent probate judge was appointed by the Governor in November, 1945, and assumed the duties of his office on December 1, 1945.

We direct your attention again to the wording of Section 25, Article V, supra, where it says: "* * * except that probate judges now in office may succeed themselves as probate judges without being so licensed, * * *"

The word "now" refers to the time that the Constitution was adopted by the electors of the state of Missouri, which was February 27, 1945. In this connection we cite the case of Application of Marino, 23 N.J. Misc. 159, 42 Atl. (2d) 469, where there was involved the determination of a person's voting qualifications under the Constitution of New Jersey, which provided that no person convicted of a crime which now excludes him from being a witness shall

enjoy the right of an elector. The court, in construing the Constitution, stated the following at Atl. l. c. 471:

"* * * The pertinent disqualification provision is of 'a person convicted of a crime which now excludes him from being a witness,' subject to other conditions here immaterial. And, this clause, by the use of the word 'now,' refers to the time of the adoption of the Constitution on September 2, 1844. * * *"

Therefore, we are constrained to say that under the construction we must give to Section 25, supra, of our Constitution, only those probate judges who were in office February 27, 1945, (the date the present Constitution was adopted) could succeed themselves as probate judge, unless licensed to practice law.

Conclusion

In view of the foregoing, it is the opinion of this department that an incumbent probate judge not licensed to practice law could not succeed himself in office unless he held office at the time of the adoption of the present Constitution.

Respectfully submitted,

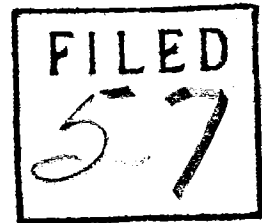
RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:CP

ROADS AND BRIDGES: Commissioners of road districts formed under Article 11, Chapter 46, R. S. Mo. 1939, elected by voters of district who qualify under Section 11469, Laws of Missouri 1943, Page 555.



June 5, 1946

6/14
Honorable G. Logan Marr
Prosecuting Attorney Morgan County
First National Bank Building
Versailles, Missouri

Dear Sir:

Receipt is hereby acknowledged of your request for an official opinion of this department reading as follows:

"In Morgan County, Mo, a road district, special, was organized under Art. 11, Chap 46, starting with sec 8710.

"In the course of voting for new commissioners, there is a state of confusion concerning the qualification of the voters. The evident intent and requirement of the article 11 requires that land owners be the sponsors and the commissioners of the said special road district. The reading of the case of State ex rel Heffernan 243 Mo. 442, 148 SW 90, would indicate that the voters for commissioners should be land owners. But section 8712, does not indicate that only land owners shall be the voters.

"It would seem that the word landowner as a voter was omitted in a revision of the law in the session acts of 1913 at page 677.

"I want an opinion as to who is a qualified voters in the election of commissioners of a special road district organized under article 11 of Chap 46, R. V. Statutes of Missouri 1939?"

In your request you indicated that a special road district has been formed in Morgan County under the provisions of Article 11, Chapter 46, R. S. Mo. 1939. Section 8710 of this article provides in part as follows:

"County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, and of contracting and being contracted with as hereinafter provided. * * *

The selection of commissioners for such special road districts formed under the provisions of this Section is provided by Section 8712, R. S. Mo. 1939, which, insofar as it applies to your question, provides as follows:

"At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be filed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about

to expire, who shall serve three years.
No person shall be elected or appointed
commissioner who is not a resident of
the district and an owner of land in the
district. * * * *" (Emphasis ours.)

It is noted that, under this section when a road district is organized, the commissioners are first appointed by the county court, and that thereafter they are elected by the voters of the district on the first Tuesday after the first Monday in January of each year.

You are correct in concluding that, according to the case of State ex inf. West, ex rel. Thompson v. Heffernan, 138 S. W. 90, 243 Mo. 442, the electors of the commissioners of the special road district were required to be landowners of the district. However, in reading this case, we note that the road district in question was organized under Article 7, Chapter 102, R. S. Mo. 1909. Section 10613 of this article provides for the method of selecting the commissioners of road districts, and in part reads as follows:

"At the term of court in which the preliminary order is made, or at any subsequent term thereafter, the said court shall appoint three commissioners, who shall be owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the land owners in said district, at an hour and place to be fixed by said commission, shall elect three commissioners, one of whom shall serve for one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years. * * * *" (Emphasis ours.)

The distinction between this section and Section 8712, R. S. Mo. 1939, supra, can be readily observed. This section used the words "land owners" in providing who should elect the commissioners, while Section 8712 employs the word "voters" in providing who shall elect the commissioners. However, Section 10613, R. S. Mo. 1909, was repealed by an act passed by

the Legislature and approved March 25, 1913, which appears in the Laws of Missouri, 1913, at Page 677. Section 10613 of this act changed the wording of the whole section by substituting the word "voters" for the words "land owners" in providing who would elect the commissioners of road districts.

Section 8712, supra, requires that the commissioners of special road districts be owners of land within the district, but it does not require that the voters within the district who elect the commissioners be owners of land. The qualification for a voter is provided in Section 11469, Laws of Missouri of 1913, Page 555, as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people: Provided, each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides; Provided further, no idiot, no insane person, and no person while kept in any poorhouse at public expense, or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting. Provided, however, that the residents of the Soldiers' and Sailors' homes shall not be construed to be inmates of a poorhouse within the meaning of this section."

Hon. G. Logan Marr

-5-

If the voters of the special road district in Morgan County possess the qualifications set out in this section, they can vote for the commissioners of the road district at an election held under said Section 8712, supra.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

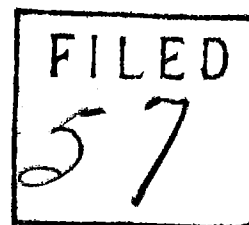
APPROVED:

J. E. TAYLOR
Attorney General

RFT:LR

TAXATION AND REVENUE: Basis to be used for computation of
merchants ad valorem tax.

July 15, 1946



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Reference is made to your letter of recent date requesting an official opinion of this office, and reading as follows:

"The assessor and the county board of equalization raised the question as to what was assessable for taxes with a local produce and feed merchant.

"This local produce and feed dealer buys wool, and says he merely buys same on commission, and the truck of the wholesale wool dealer comes often and collects the wool. This wool bill runs into big money, yet this produce dealer says that he is not assessed for this wool, because, he does not own it, it is not in his possession, and not really under his control. He does not want to be charged as that business for taxation. Is that wool buying the largest amount he has on hand between the first Monday in March and the first Monday in June?

"Then this same merchant buys in and ships out every day large quantities of chickens and eggs, and he refuses to consider this as taxable goods on hand.

"He has also a contract with a large hatchery to buy hatching eggs for this hatchery, and he buys eggs and twice a

week during the hatchery season these hatching eggs are gathered up, and taken out. This produce dealer says that the eggs belong to the other fellow and are not goods on his hands for taxation. Is this amount, the largest amount on hand, any one day, taxable under the taxing of merchants?

"This local dealer holds in storage soy beans, lespedeza seed, clover seed, that belongs to his customers, and the same are held in his warehouses for better prices. If the local produce dealer can sell same for a profit, that is up and above the price the same are held for, he does. Is this taxable as actual goods on hand?"

The complete scheme for the taxation of merchants is found as Article 18, Chapter 74, R. S. No. 1939. By virtue of the passage and approval, with an emergency clause, of H.C.S.H.B. 536 of the 63rd General Assembly, the entire article has been retained with changes necessary to conform with the provisions of the Constitution of 1945. The bill became effective March 26, 1946. The particular matters about which you inquire are determined by the provisions of Section 11305, R. S. No. 1939, found as a part of H.C.S.H.B. 536. Said section reads as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission." (Emphasis ours.)

You will note from the underscored portion of the statute quoted supra that commission merchants are not required to in-

clude in their total stock of merchandise any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which such merchant has no ownership or interest other than his commission. Reference to your letter indicates that the various items mentioned therein are claimed to be exempted from the provisions of the taxing portion of this statute under the proviso mentioned. It is, of course, impossible for this office to determine factual matters. However, we might say that in view of the broad powers granted the Merchants Board of Equalization to subpoena witnesses, such factual matters may be readily determined by that body. We can but render our opinion upon the construction to be given the statute, enunciating general principles, which may be applied in specific cases by the Merchants Board of Equalization based upon the facts determined by them in each instance.

In the first place, the proviso applies only to commission merchants. It, therefore, becomes pertinent at the outset to determine whether or not the business transactions of a particular individual come within the designated category of those to whom the proviso applies. The Supreme Court of Missouri, in *State ex rel. Parker v. Thompson, et al.*, 120 Mo. 12, 1. c. 20, has defined the term "commission merchant." The definition found therein is as follows:

"A factor or commission merchant is generally defined to be 'an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission.' Story on Agency (9 Ed.), sec. 33."

Further, the words "growth" and "produce" appear in the proviso. The term "growth" has been defined as being that which has grown or which is growing; anything produced, a product. Words and Phrases, Perm. Ed., Vol. 18, p. 786.

The term "produce" has been defined as that which is produced or grown in, or is the yield of, the state, including crops, timber, coal and iron, and everything produced from or found in the soil of the state. Words and Phrases, Perm. Ed., Vol. 34, p. 184.

In view of the fact that the term "commission merchant" had acquired an appropriate and peculiar meaning in law prior to having been incorporated in the statute under consideration,

we believe the provisions of Section 655, R. S. Mo. 1939, to be germane in construing such statute. Section 655, R. S. Mo. 1939, reads, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * "

Applying this rule to the term "commission merchant," it is seen that the proviso applies to only a very limited class of merchants, and we may not extend its meaning to encompass others whose business transactions are not such as to bring them clearly within the purview of the definition. That the General Assembly contemplated that the technical import of the term should be used in the construction of the statute is further indicated by the phraseology employed. In this respect, your attention is directed to the phrases "consigned to them for sale" and "which may have been consigned for sale." To us, both of these plainly indicate that the term "commission merchant" was used in the proviso in its technical legal sense, that is to say, as meaning one who has in his possession or under his control the goods, wares and merchandise of another for the purpose of sale.

While it is undoubtedly true that the various items mentioned in your letter of inquiry, that is, wool, chickens and eggs, hatching eggs, soy beans, lespedeza seed, and clover seed, are included in the terms "growth" or "produce," yet such fact does not relieve the merchant of including them in determining the maximum amount of goods, wares and merchandise on hand at any one time during the period specified, to be used in determining the maximum value thereof, unless his dealings are those of a "commission merchant."

With the above principles in mind, we have reexamined your letter of inquiry. The claim of exclusion with respect to the transactions in wool is based upon the claimed fact that the dealer merely purchases such wool upon a commission basis and does not at any time have title thereto nor have such produce under his control or in his possession. This,

of course, squarely presents a question of fact based upon the contract of the dealer and his claimed principal, and one which this office is unable to determine. However, as mentioned supra, the Merchants Board of Equalization is in a position to obtain all necessary information relative to the true nature of the transaction. The final determination will involve questions of contract, sale, bailment, and principal and agent, and can be resolved only when all of the pertinent facts are presented. We might say, though, that if the dealer acquires such wool in his own name, actually taking title thereto, and thereafter simply sells the entire lot, made up of numerous purchases, to some other person, the mere fact that his compensation therefor would be determined upon a percentage or commission basis would not serve to permit the exclusion of the value of the wool in determining the highest value of goods, wares and merchandise on hand during the prescribed period.

With respect to the purchases of chickens and eggs, we think that such produce must necessarily be included in the aggregate valuation, as no statement appears in the letter of inquiry to indicate that the transaction, so far as the dealer is concerned, is anything but one of outright purchase and sale. Under these circumstances, the chickens and eggs do constitute a part of his stock of goods, wares and merchandise.

With respect to the hatching eggs purchased under an alleged contract with a hatchery, under which title, possession or control of the eggs is never vested in the dealer, the same factual questions are present as are necessary for the determination of the matter with respect to the dealings in wool, mentioned supra. Again, we can but say that the mere fact that the purchases are made under an agreement by which the compensation is determined upon a commission basis does not constitute the dealer a "commission merchant" with respect thereto, and if title, possession or control does vest in such dealer, he necessarily must include the value of such hatching eggs in arriving at his total valuation for tax purposes.

As to the soy beans, lespedeza seed, clover seed, etc., that are held by the dealer in storage for his customers, a somewhat different situation presents itself. If he is, under his contract, required to return to the respective owners of the various items mentioned their identical produce, merely receiving from them a stipulated storage charge for his services in connection therewith, the items do not

constitute any part of his stock of goods, wares and merchandise. On the other hand, if the dealer has the right to dispose of such items in ordinary commerce, or to commingle such items with his own stock of similar items and use the entire lot for the purpose of filling his ordinary orders, so that such items in storage with him are actually in his possession and under his control, it will be necessary for him to take into consideration the value of such items. Again, it may be possible that the terms of the contract of the merchant with the respective owners of the various items are such as to permit the disposal of their respective holdings when in his judgment such disposal by sale is proper. If the various items be consigned to the merchant for sale under these conditions, and under an agreement to reimburse the merchant for his services in connection therewith on a commission basis, such contract possibly would constitute the merchant a "commission merchant" with respect to such items. Such being the case, the items would then be excluded from his inventory under the quoted proviso. Here, again, are questions of fact which will necessarily have to be determined by the Merchants Board of Equalization.

CONCLUSION

In the premises, we are of the opinion that, in the absence of contractual relations with the owners of the various items of growth and produce mentioned in your letter of inquiry, which constitute the merchant a "commission merchant" within the meaning of that term as defined in legal phraseology, such merchant must give due regard to the total value of such items in arriving at the highest amount of all goods, wares and merchandise which he has on hand at any time between the first Monday in January and the first Monday in April, in any year, for the purpose of determining the ad valorem tax due and owing by such merchant.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

11/15
TAXATION: Levying of taxes by directors of school districts and the right of the county court to amend such levies when such court is making the levy of taxes on railroads and other carriers for the rolling stock, road bed and movable property of such carriers.

September 26, 1946

10/1
FILED

57

Honorable W. V. Mayse
Prosecuting Attorney
Harrison County
Bothany, Missouri

Dear Sir:

This is to reply to yours of recent date wherein you submitted the following request for an official opinion from this department:

"I enclose herewith a copy of a letter from the Chicago, Burlington & Quincy Railroad to Mr. A. M. Justice, one of the three County Judges in our county, relative to levy of school taxes. The letter is self-explanatory. The railroad is saying that: 1. A school district does not have any right to levy an amount for school purposes in excess of that which will be necessary to raise enough revenue for the up-keep and operation of the school in any particular district for the year for which the levy is made. In other words, they are adopting the position that the school district cannot make a levy which will not only operate the school but will leave, in addition thereto, a surplus.

"Point two raised by them is that if it be found that levies made in districts of counties are more than is needed to take care of anticipated expenses in the various districts, individually, does the County Court then have the power to reduce the rate of levy for school purposes?"

Section 10347, R. S. No. 1939, which was repealed and reenacted by the 63rd General Assembly in Senate Bill No. 208, approved on January 25, 1946, and which Senate Bill relates to the levying of school taxes by district boards, reads as follows:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the County Superintendent of Schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

It will be noted that this section requires the board of directors of the school district to forward their estimates and rates to the county superintendent of schools. Under Section 10612, R. S. No. 1939, the duties of the county superintendent of schools, with respect to such estimates and rates, are as follows:

"* * * he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk * * *"

While your letter does not indicate whether or not the estimates and rates were submitted to the county superintendent of schools and were approved by him, for the purpose of this opinion we will assume that the officials did perform these duties. In 31 C. J. S., page 799, Sec. 146, the principle applicable in such cases is stated as follows:

"In the absence of evidence to the contrary, there is always a presumption that official acts, including ministerial acts, or duties have been properly performed, and in some states this presumption is expressly prescribed by statute. Stated in another way, it is, as a general rule, presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him, * * *"

In *Waterman v. Chicago Bridge & Iron Works*, 41 S. W. (2d) 575, the court, in applying the rule as to the Workmen's Compensation Commission, made this statement (l. c. 578):

"So far as the record shows there was no irregularity in the proceedings. Irregularity cannot be presumed. The presumption is to the contrary, to wit, that public officials have properly performed their duties. * * *"

With this presumption in mind we may assume that the board of directors of the various districts forwarded their estimates and rates to the county superintendent of schools and that he received those estimates and rates, found that they were properly made and approved them and turned them over to the county clerk.

Then under Section 10395, R. S. No. 1939, which was repealed and reenacted without any change as to the duties of the county clerk, with respect to the question here involved, by said Senate Bill No. 208, it is provided as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes; Provided, the levy

thus extended shall not exceed in any one year the following rates on the hundred dollars assessed valuation; * * *

The first part of your request involves the question of whether or not a board of directors of a school district may make a levy which will bring in more taxes than are needed for the district to operate on for the current year.

In treating a question similar to the one here under consideration, the Missouri Supreme Court, Division One, in the case of Pope v. Lockhart et al., 252 S. W. 375, 376, said:

"The statute (section 11142, R. S. 1919) makes it the duty of the school board to make the estimate of the funds necessary to sustain the school in its district and state the amount and the rate required to raise it. Section 11183, R. S. 1919, makes it the duty of the county clerk 'on receipt of the estimate * * * to assess the amount so returned on all taxable property, * * *' except he shall not exceed stated limits which do not affect the question in this case. The withdrawal and correction of the mutilated estimate was lawful. State ex rel. v. Phipps, 148 Mo. loc. cit. 36, 37, 49 S. W. 865. It is clear that the Legislature committed to the school board the duty to make the estimates for the year, and that the board kept its estimate well within the lawful limits of the levy constitutionally authorized by the voters. The courts are not expressly given authority to revise the estimates of the board, and will not arrogate to themselves such power merely because it may be thought the levy recommended will raise a sum in excess of the needs of the fund for which the levy is made, nor yet because there may be some evidence tending to show an intent to divert the money, after its collection, to another purpose, since this can be dealt with when such attempt at diversion is made. C. C. C. & St. L. Ry. Co. v.

People, 208 Ill. loc. cit. 11, 12, 69 N. E. 832, and cases cited; 1 High on Injunctions (4th Ed.) Sec. 544, pp. 517-519. The power given the board is 'highly discretionary' and legislative in nature."

In the case of Lyons v. School District of Joplin, 278 S. W. 74, a taxpayer attempted to enjoin the collection of a school tax levied for the payment of building and repairs and for a sinking fund, contending that the levy for the building and repairs was in excess of the constitutional limit and that the levy for the sinking fund was in excess of the sum needed for the current year. In speaking of the levy in excess of the amount needed for the sinking fund for the current year, the court said (l. c. 77):

"* * * The levy for interest, as we have already remarked, appears to be more than sufficient to pay the annual interest, but that fact, with the allegation that there is an intent to divert some of the fund when received, did not avoid the levy nor warrant injunction against the collection of those taxes. Upon the situation thus presented, the holding of this division of this court in Pope v. Lockhart, 299 Mo. 141, 252 S. W. 375, is apposite. * * *"

And in considering the powers and duties of the county court in respect to levies of school taxes, the Springfield Court of Appeals in the case of State ex rel. Chadwick Consol. School Dist. v. Jackson, 84 S. W. (2d) 988, said (l. c. 989-990):

"* * * In so far as the making of levies for school districts is involved, the county court has been given no supervisory powers whatever. Estimates for sinking fund and interest on bonded indebtedness of any district are made by the school board of such district. Sections 9203, 9204, R. S. Mo. 1929 (Mo. St. Ann. Secs. 9203, 9204, pp. 7076, 7077). Upon receipt of such estimates it becomes the duty of the county clerk to make the assessment against the taxable property lying within

the district, if within the limits proscribed by law. Section 9261, R. S. No. 1929 (Ho. St. Ann. Sec. 9261, p. 7109). The board of directors in this case made an estimate of 25 cents on the \$100 valuation for sinking fund and a similar amount for interest. Such estimate was within the constitutional and statutory limit. It is true that at the time the estimate was made there appears to have been on hand sufficient funds belonging to the district to have retired all outstanding bonds. It was upon such state of facts the county court attempted to quash the levy and order the county collector not to collect the alleged illegal levy. There is no statutory authority for such procedure or exercise of judicial power by a county court. In fact, no court is given statutory power to revise an estimate of a school board when within the legal limits allowed by law. * *

The foregoing cases dealt with the question of the authority of the county court to revise an estimate and levy made by a board of directors of a school district. In all of those cases the levies were made for local taxes. However, each of the cases hold to the effect that it rests within the sound discretion of the board of directors as to how much their estimate will be and what their levy will be and that no court is given statutory power to revise an estimate of a school board when within the legal limits allowed by law.

In the levying of a tax on the road bed, rolling stock and movable property of railroads and other carriers, the powers and duties of the county court with respect to such levies are different. Section 11260, R. S. No. 1939, relating to those duties, was repealed and reenacted by the 63rd General Assembly in House Committee Substitute for House Bill No. 535, approved December 13, 1945, and by Section 18 thereof it is provided in part as follows:

"For the purpose of levying school taxes, and taxes for the erection of public buildings, and for other purposes, in the several counties of this state, on the

roadbed, rolling stock and movable property of railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, and also the average rate of taxation levied for the erection of public buildings, and for other purposes, each separately, by the several local school boards or authorities of the several school districts throughout the county. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the State Tax Commission, under the provisions of this article, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said districts. * * *

In the case of State ex rel. v. Hannibal and St. J. R. R. Co., 135 Mo. 618, the court, in construing the statute of 1889, which contained the same provisions as to the levying of school taxes on railroads as does the said Section 18, supra, said, 1. c. 628:

"By that statute express power is given to the county court, and to the county court alone, to levy such taxes on railroad property, both local and distributable, and the manner is prescribed in which that power shall be exercised (secs. 7731, 7732), and until the county court has made such levy, the clerk has no power to extend such taxes upon the tax books against the property of the railroad company (sec. 7733). * * *

And in discussing the question of the duties of the county court under this section, the court said, l. c. 630:

"This statute seems to be susceptible of but one construction, and that is that the value of the roadbed and rolling stock and other movable property of the railroad company shall be taxed for school purposes at the average rate, and that tax be distributed to the several school districts of the county, and that the buildings on the right of way shall be taxed at the rate that other property is taxed in the district in which such buildings are situate, and that such tax shall go to such district."

In the case of State ex rel. Lano v. The Hannibal & St. J. Ry. Co., 110 Mo. 265, 271, the court in speaking of the procedure of the county court, in making these assessments, said:

"* * * It was the duty of the county court to ascertain the average rate of taxation for school purposes and building purposes from the official returns of the local school boards filed with the county clerk, * * *"

This statement would indicate that the county courts must use the statement of the estimates and rates filed by the county clerks to ascertain the average rate of assessment.

From all of the cases which we have cited herein it seems that so long as the boards of directors of the school districts stay within the constitutional and statutory limits in making their estimates and rates for the purpose of levying taxes, that the county courts would be required to use those estimates and rates for the purpose of arriving at the average rate to be levied and assessed against railroads and other carriers. Since the powers and duties of county courts and boards of directors of school districts are purely statutory, then they can perform only such functions as are prescribed by statute.

On the question of the authority of the county court to amend or revise these estimates and levies, we find that a

statute was enacted in 1933, Laws of Mo., 1933, page 424, Section 11118, R. S. Mo. 1939, which might have given county courts authority to revise estimates and levies such as are under consideration here. This law was enacted following the decisions in the cases which laid down the rule that county courts could not revise estimates and levies of boards of directors of school districts. However, the 63rd General Assembly by House Committee Substitute for House Bill No. 537, approved December 5, 1945, repealed said Section 11118, R. S. 1939, and there does not seem to be any authority now for a county court to change the assessment of an assessing body. That being the case, the county court would be bound by the principles announced in the earlier cases, that is, that the estimates and rates submitted by the boards of directors of school districts may not be revised or amended by the county court.

Conclusion

From the foregoing it is the opinion of this department that the estimates and rates for the purpose of levying taxes to operate schools, lies within the sound discretion of boards of directors of the school districts and that the county courts do not have any authority to revise such estimates of the amount needed for taxes and the rates made by the directors even though the tax derived by such estimates and rates will exceed the amount actually needed by the district for the current year's expenses.

We are further of the opinion that county courts, in making the assessments and levies of taxes for school purposes against the roadbed, rolling stock and movable property of railroads and other carriers which are similarly taxed, must use the estimates and rates submitted by the directors of the school districts of the counties as a basis for determining the average rate to be levied against such carriers and that the county court does not have any authority to revise or change the estimates and rates so submitted.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
Attorney General

PENSIONS: Funds for payment of firemen's and policemen's pension must come from source set out in pension plan adopted.



June 12, 1946

6/14

Honorable W. H. McDonald
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for our official opinion, as follows:

"A number of questions have been asked me concerning House Bill No. 297 which is now a law and pertains to the retirement fund for the police and firemen.

"In a recent election in Joplin, the pension fund for both policemen and firemen passed by a substantial majority. The levy to pay for this fund as presented to the voters called for two-thirds majority providing for the funds necessary to carry out the pension fund. It was suggested by some that this pension fund should come out of the general revenue fund and did not require the approval of the electorate."

Pursuant to our request, you have furnished us a copy of the Pension Plan created by Ordinances of the City Council of Joplin, Missouri, relating to the Firemen's Pension Plan and the Policemen's Pension Plan, which were submitted at a regular municipal election on April 2, 1946, and which were approved by a majority of the voters at the election.

House Bill No. 297 was duly approved by the Governor on December 19, 1945, and authorizes municipalities in first class counties and other municipalities which have more than 6,000 inhabitants to pension salaried members of their organized police force or fire department, and is as follows:

"Section 1. Any municipality in any county of the first class, and any other municipality in this state which now contains or may hereafter contain not more than 100,000 inhabitants nor less than 6,000 inhabitants as determined by the last preceding federal census is hereby authorized to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of deceased members: Provided, however, that nothing in this act shall be construed to affect any pension or retirement system for members of an organized police force or fire department, and their widows or minor children, which has been established previously under authority of an act of the General Assembly and which is in operation at the time of the passage of this act, and the provisions of law applicable to any such pension or retirement system shall not be deemed to be repealed or superseded by the provisions of this act. This act shall not take effect in any such city until approved by the voters thereof as herein provided. On order of the city council, or on petition of 100 qualified voters of said city, the city clerk shall publish notice thereof and submit to the qualified electors of said city at the next general or municipal election the question: 'Shall the police or firemen's pension plan be approved?' If a majority of the voters casting votes thereon at the election is in favor of the question, this act shall take effect in said city thirty days after the election. Notice of every such election under this act shall be published at least once a week for at least three weeks in a newspaper of general circulation in said city, the last publication to be not more than three nor less than two weeks next preceding the election."

The bill was enacted with an emergency clause.

The pensions contemplated by the above act were made possible by Section 25, Article VI, of the Constitution of 1945, which provides as follows:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

A reference to the Pension Plan adopted at the Joplin election on April 2, 1946, discloses the method of providing funds for the payment of pensions. Section 4 of the Ordinance is as follows:

"The Board of Trustees shall annually, prior to the time provided by law for the fixing of the tax levy rate by the City Council, certify to the City Council the amount of money which the Board finds will be required to cover all payments which the Board anticipates will become due and payable hereunder during such annual period. The City Council shall submit a proposition to the qualified electors of the city to increase the rates of taxation as limited by the Constitution of 1945 and as limited by law for a period of not to exceed four years, and if two-thirds of the qualified electors voting thereon shall vote therefor, a special levy for the purpose of maintaining the Pension Fund shall be authorized. The City Council shall, in fixing the annual tax levy

rate, include such special tax levy upon all taxable property subject to taxes for city purposes, and the proceeds of such special tax levy shall be placed to the credit of a fund to be known as the Pension Fund, from which all disbursements in connection with the Firemen's Pension Plan and the Police Pension Plan shall be made. Disbursements from such fund shall be authorized by vouchers drawn by the Board of Trustees and certified to the City Council, and the City Council shall by ordinance appropriate from the Pension Fund the money necessary to pay such vouchers. If at any time the electors shall fail to authorize a special tax levy for the purpose of maintaining the Pension Fund as herein provided, then the City Council shall not be authorized to make such special tax levy nor to levy any taxes for such purpose. The maximum amount of any special levy shall be limited to the amount authorized by the qualified electors from time to time."

Since the above portion of the Pension Plan clearly limits public funds to be used to those obtained by a special tax levy to be approved by two-thirds of the qualified electors voting on the question, it is clear that no portion of the general funds of the city can be used for this purpose so long as the present Ordinance and Pension Plan remains in effect. We find the well settled rule expressed in *Orthwein v. St. Louis*, 265 Mo. 556, 1. c. 568:

"* * * Ordinances, like statutes, are primarily to be interpreted according to the ordinary meaning of their words and the proper grammatical effect of their arrangement. It will be presumed that the municipal legislature, like that of the sovereign State, are conversant with the simple rules of grammar and have expressed their will in apt terms, unless it is apparent in the act itself that the application of such a presumption would be absurd, extravagant, or repugnant to other provisions of the law which must stand with it. * * *"

Honorable W. N. McDonald - 5

CONCLUSION

It is, therefore, our conclusion that under the present Pension Plan as adopted by the City of Joplin, and as submitted with your opinion request, funds for the payment of pensions to firemen and policemen must be derived from a special levy authorized by two-thirds of the qualified electors voting at an election for that purpose, and that funds received under the general levy fixed by the City Council cannot be used for such purpose under the present Plan.

Respectfully submitted,

ROBERT L. HYDE
Assistant Attorney General

APPROVED:

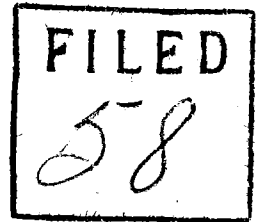
J. E. TAYLOR
Attorney General

RLH:MR

SPECIAL ROAD DISTRICTS:
OFFICERS:

Treasurer of special road district is guilty of no criminal violation when trucks to be used by the road district are purchased from a firm of which he is president and principal stockholder, but if the treasurer is also a commissioner of the road district, the contract is against public policy.

August 13, 1946



Honorable W. N. McDonald
Missouri House of Representatives
Jasper County
Joplin, Missouri

Dear Sir:

We acknowledge receipt of your letter of July 29, 1946, requesting an official opinion of this office, and reading as follows:

"Mr. W. M. Robertson is the president and principal stockholder of the R. & S. Motor Sales Company, and he also is treasurer of the Joplin Special Road District. For the past several years the Joplin Special Road District has purchased Chevrolet trucks and automotive parts from this firm.

"Section 10 of House Bill No. 794, passed by the recent 63rd General Assembly, prohibits an officer of any road district from being 'pecuniarily interested' in the sale of equipment to be used for the building or repair of any county highway.

"Would you please render me your opinion with regard to whether this new law prohibits the R. & S. Motor Sales Company from furnishing any further equipment to the Joplin Special Road District."

House Bill No. 794, which you refer to in your letter, is entitled "An Act to provide for the office, duties and function of the office of county highway engineer and surveyor in counties of class one." Section 14 of this bill provides, "The provisions of this act shall be applicable only to coun-

ties of class one." It can be seen that a special road district in Jasper County is not affected by any provision of this bill.

However, it has been held in an official opinion of this office dated October 7, 1942, to Hon. Wilson D. Hill, Prosecuting Attorney of Ray County, a copy of which opinion is enclosed, that it is against public policy for a commissioner of a special road district organized under Section 8673, R. S. Mo. 1939, to make purchases from a firm in which he owns stock or in which he is a partner.

You do not state in your letter whether Mr. W. M. Robertson is a commissioner of the special road district or whether he is merely the treasurer. Since the language used in State v. Bowman, 184 Mo. App. 549, quoted in the enclosed opinion, clearly indicates that the restriction on the purchase or supplies or entering into contracts by a member of the board of directors of a municipal corporation with a firm in which he is interested is based upon the power of the member of the board to contract with himself, the treasurer of a special road district has no power to let contracts and there would be no prohibition against a firm in which he was a stockholder furnishing trucks to the special road district unless he was also a commissioner of the road district itself.

CONCLUSION

House Bill No. 794 does not apply to a special road district in Jasper County.

If the treasurer of a special road district is also a commissioner of a special road district, a contract entered into by the road district to purchase trucks from a firm in which he is the principal stockholder would be against public policy. However, there would be no violation of any criminal statute in this case. If the treasurer of the special road district is not a commissioner of the district, the purchase of trucks by the road district from a firm of which the treasurer is the principal stockholder is valid and in no way illegal.

Respectfully submitted,

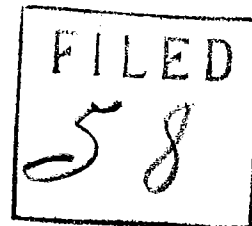
C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PROBATE JUDGE: 1. After January 1, 1947, cannot be paid anything for services other than his salary;
2. Can appraise estates for inheritance tax purposes without appointing appraisers, but cannot be paid extra for said service.

December 30, 1946



Hon. Bert E. McCracken
Probate Judge
Warrenton, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"An examination of The Constitution of 1945 in connection with Art. V. Section 24. And Senate Bill No. 203 of 63rd General Assembly, contains the following language; "No Judge or Magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except Probate Judges during their present Terms."

Does this mean that after January 1st, 1947 a Probate Judge can no longer appoint himself and act as Inheritance Tax Appraiser? Does it mean that in the event he acts, he must make no charge for his service? Does it mean that he must appoint some one else to render this service?

In this County it will be hard to get an appraiser who knows anything about this work and I will appreciate your opinion in the matter."

Your letter in reality submits two questions. One is, "After January 1, 1947, if the Probate Judge appraises an estate for inheritance tax purposes, can he be paid for such service in addition to his regular salary?", and the other is, "After January 1st, will the Probate Judge be required to appoint an inheritance tax appraiser in connection with levying such taxes on estates?". We will discuss the questions in order.

Section 24 of Article 5 of the Constitution of Missouri reads as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

It will be noticed that the foregoing section of the constitution provides that no judge or magistrate shall receive any other or additional compensation for any public service in addition to his salary. We believe this provision contemplates that probate judges are to be compensated for all services rendered by them as public officers by their salary. Said provision is a limitation on the legislature and prevents the legislature from providing compensation for probate judges other than their salary. The probate judge can appraise estates for inheritance tax purposes, as will be discussed hereinafter, but such appraisal, if done by such judges, would be an exercise of the powers and functions authorized by law and hence a part of the services for which a salary is provided.

Apparently carrying out the provisions of the foregoing constitutional provision, the 1945 Legislature by S. B. 203 provided limitations against probate judges practicing law or acting as administrators, etc. and specifically provided that

"Nor shall the judge of such court act as deputy or clerk for any other public official or receive any compensation for any public service other than his compensation as such judge; * * * *"

It might be suggested that the appraisement of an estate for inheritance tax purposes is not a "public service". We are not able to find a general definition of the words "public service", but we think the words taken in their ordinary meaning mean service rendered by officers and employees of the state, county, political subdivisions, municipalities and other agencies created by law and which administer the laws. The assessment and collection of inheritance taxes are matters provided for by law, and those who appraise estates are administering the laws of the state. The taxes assessed and collected upon such appraisement are controlled and disposed of by the legislature for such purposes as that branch of the state government considers for the best interest of the public. One who appraises estates as a basis for levying inheritance taxes is therefore performing a service to the public and, therefore, we think the law prohibits a probate judge from receiving compensation for such service in any manner other than by his salary.

Moreover, by Section 13404A, Laws 1943, page 868, it is provided that probate judges did not have to account for the fees earned by them in hearing and determining inheritance tax matters, and this office has ruled that such judges were entitled under that law to retain said fees over and above the salary then provided for the judges. However, the 1945 Legislature by S. C. S. S. B. No. 200 prescribed certain fees to be taxed up in connection with the administration of estates for services rendered by the probate judge and then provided as follows:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor,

one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer.

In counties now or hereafter having more than 250,000 inhabitants such fees shall be charged, collected and paid over and the above mentioned reports and affidavits shall be made by, the clerk of the probate court."

Said latter act specifically designated that all fees charged for services by the Probate Court were to be charged upon behalf of the state or county as the case might be and that said fees when collected should be paid to the Director of Revenue or the County Treasury. We think said section further carries out the purpose of the constitutional provision and salary

statute above referred to. This latter statute contemplates that all fees earned by the probate court should be paid into the public treasury from which the probate judge receives his salary. One of the fees set out by said last named act is a fee

"For supervising all estates in each court and having appraised such of said estates as may be liable for taxes under the state inheritance tax law, in addition to the fees applicable as hereinbefore provided, a fee of two and one-half per cent of all such inheritance taxes finally assessed and paid on property assessed through the respective courts shall be charged, the same to be collected by said judges from the person whose duty it is to pay such tax; provided in all estates in which the state treasurer or the executor, administrator or trustee in charge thereof, shall be required under the provisions of the inheritance tax law to refund to the person entitled thereto any inheritance tax collected by them, the state or county receiving same shall refund to the person entitled thereto out of the two and one-half per cent fee on such tax the proportional part thereof to which any such person may be entitled to a refund.

We think it is clear, therefore, that not only the constitution but the legislative acts above referred to contemplate that probate judges shall receive nothing beyond a salary for any services which they perform by virtue of their office.

Your second question is whether the probate court must appoint an appraiser to appraise estates for inheritance tax purposes. Section 585 of the Statutes of Missouri as enacted by H. C. S. H. B. 651, Laws 1945, vests in the probate courts jurisdiction to determine the amount of inheritance taxes due by estates, and then provides as follows:

"If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to

cause notice thereof to be given in the same time and manner and to the same parties as is hereinafter provided for appraisers, or the court before determining such matters, may of its own motion, or on the application of any interested person, including the Director of Revenue, the prosecuting attorney or attorney-general, appoint some qualified taxpaying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this act."

The foregoing section provides two methods by which an estate may be appraised for inheritance tax purposes. One is for the probate court to set a day, notify interested parties and on the day set proceed to determine the amount of the inheritance tax due by such estate. Such determination would necessarily require that the court first appraise or put a value on the estate. The other method is for the Court to appoint an appraiser to appraise the estate, and when such appraisal has been made, the court then assesses the inheritance taxes due. The statute does not require that an appraiser be appointed. The probate court can appraise the estate and determine the tax, but as pointed out above, the fee for his services in such matter would have to be turned into the state or county as the case may be.

Conclusion

It is, therefore, the opinion of this office (1) that after January 1, 1947, a judge of the probate court cannot be paid for his services in appraising an estate for inheritance tax purposes any amount over and above his regular salary, and (2) that after

January 1, 1947, the probate judge is not required to appoint an appraiser to appraise estates for inheritance tax purposes but may make such appraisal himself and whatever fees are allowed by law for such services must be turned into the state or county treasuries, as the case may be.

Yours very truly,

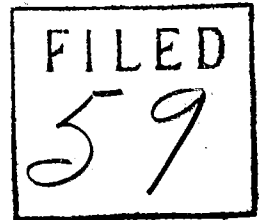
Harry H. Kay
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

HHK/vlv

MOTOR VEHICLES.) State Inspector of Oils cannot by rule extend
FUEL TAX:) provisions of law to require license from persons
not included in statute.



May 27, 1946

Honorable Hugh I. McSkimming
State Inspector of Oils
Jefferson City, Missouri

Dear Sir:

Your opinion request of April 20, 1946, presents for our decision the question of whether under Section 24, (Laws of Missouri, 1943, page 696) of the Motor Fuel Tax Law, the administrator may by rule or regulation bring "sub-agents, sub-dealers, and sub-distributors" under his supervision and control with respect to their dealing in motor fuels.

You do not state what the nature of the contemplated regulation would be, but from attached correspondence it appears that you will require some kind of license with monthly reports accounting for the tax due upon the motor fuel sold or handled by such class of persons. We also draw upon said correspondence for a definition of "sub-agents, sub-dealers, and sub-distributors," and it appears that they are persons engaged in the business of selling motor fuel, but who do not first receive it in this State. In other words, the fuel which they handle is first imported into this State by some other person and sold to these "sub-agents, sub-dealers, and sub-distributors," who in turn sell, perhaps to other retailers or the consumers.

Section 24, Laws of Missouri, 1943, page 696, provides that:

"The administrator shall prescribe and publish all needful rules and regulations for the enforcement of this Act."

Under this section, in order to determine just what rules and regulations the administrator may prescribe, we must look to the terms "of this act" for this statute limits such rules to

those which enforce the act, and also contains the further limitation that they must be "needful" rules.

In 1943, the General Assembly enacted a completely new "Motor Fuel Tax Law" which appears in Laws of Missouri, 1943, pages 670 to 699, inclusive. Comparison of this act with the provisions of the law as it existed theretofore, shows that the method employed in the new act for imposition of the tax and collection and enforcement of the payment of this revenue constitutes a drastic departure from the method theretofore employed. The old act (Sections 8411 to 8442, R. S. Mo. 1939, and amendments thereto) employed this method: It licensed distributors and dealers and the definition of distributor (Sec. 8411 as amended in Laws 1941, page 447) included every person who manufactured, refined, produced, compounded, shipped, transported or imported motor fuel in this State. A dealer was defined as every person, other than a distributor, who distributes or sells motor fuel within this State. The broad scope of these definitions included everyone who in anyway dealt in gasoline, except the consumer.

Prior to 1943 we are informed there were some 800 to 1000 distributors licensed and some 12,000 dealers who held licenses. The old act required each to make a monthly report to the State Oil Inspector, account for the gasoline handled by him and pay the tax due thereon or show that the same was paid to some other dealer or distributor who had in turn paid the same over to the State. The liability for the tax there imposed was fastened upon all who handled a particular gallon of gasoline, until someone of those handlers had paid the tax to the State Treasurer. That was the express ruling of the Court, as respects distributors, in State ex rel. Winn v. Banks, Mo. Sup., 145 S. W. (2d) 362-365, where it is said:

" . . . there is nothing anywhere in Article 2 which authorizes one distributor to satisfy his obligation to pay a license tax to the State, by paying it or any part of it to another distributor. On the contrary, he is required by Section 7795 to 'pay to the State Treasurer.'"

As respects dealers, Section 8442 provided a method whereby, in the event they paid taxes to another who failed to pay over to the State Treasurer, the tax could be assessed against them. And Section 8432 provided that in the event no

distributor or dealer paid the tax to the State then the person using the same for the purpose of operating a vehicle upon the highways was liable therefor.

The new act drastically limits the class which is liable for the payment of the tax. Section 3 provides for the tax and imposes the liability in the following terms:

"(b) For the privilege of receiving motor fuel to be sold for use in propelling motor vehicles upon the public highways of this State, there is hereby imposed upon every person receiving fuel in this State, a license tax equal to two cents (2¢) per gallon on all motor fuel received to be sold * * *" (Underscoring ours.)

We direct your attention particularly to the fact that under this, the tax imposition section, the tax is imposed upon the receipt of the motor fuel in this State.

Section 2 (g) provides that "For the purpose of determining liability for payment of the tax herein imposed, motor fuel shall be deemed to be 'received' as follows:" And then contains four sub-divisions, each detailing a particular operation which constitutes a "receipt" of motor fuel. We need not set each of those out in full. It suffices to say that the first covers the time fuel is withdrawn from storage tanks at a refinery, boat, barge or pipeline terminal in this State and designates the "receiver" as the person who was owner of the fuel immediately prior to the time of withdrawal, except where it is withdrawn for delivery to a licensed distributor, in which case the fuel is "received" by the distributor to whom delivered. The second definition of a "receipt," excluding the foregoing class, makes it at the time when motor fuel imported from without the State is unloaded from the transportation equipment (such as tank cars or trucks) and the person who is the owner thereof immediately after the unloading is the "receiver." The third class applies to those, other than those first mentioned, who produce, compound or blend fuel in this State and fuel is "received" by this group at the time of the producing, compounding or blending by the person who is owner of it at such time. The fourth class applies to those who acquire motor fuel by methods other than those detailed in 1,

2, and 3, unless the person from whom the same is acquired has paid or incurred liability with respect to the tax imposed."

Prior to thus setting up that constitutes a "receipt" of motor fuel, Section 2 (e) defines "distributor" to

"..... mean and include any person who first receives motor fuel within this State (within the meaning of the word 'received' as hereinafter defined:)"

and Section 7 imposes the whole responsibility for making reports to the State and payment of the taxes due, upon those who are distributors.

This act is strictly a revenue measure, and every section contained therein is built upon the proposition that its requirements assist the administrator to determine the true amount of motor fuel each distributor has received in a given month and has accounted for the tax thereon to the State. Examples are Section 11, requiring reports from transporters; Section 12 requiring records of distributors and dealers to be kept for 5 years, and other sections, all of which provide methods whereby a cross check can be had on a distributor's report to determine its accuracy.

It is apparent from our comparison of the old act and the new that one of the major purposes of the new act was to strictly limit the class of persons who are subject to the jurisdiction of the administrator to those who "receive" motor fuel in this state, and that the new act purposely omitted a large class of persons who in other ways may sell or handle motor fuel, but who do not "receive" the same. The general rule in such cases is stated in 59 C. J., Sec. 122, page 112, as follows:

"* * * A departmental regulation in effect imposing a requirement which was purposely omitted from the statute under which the regulation was drawn is invalid, * * *"

The power of the administrator under Section 24, supra, does not go beyond that of the law. He cannot require a person whom the law does not require to be licensed, to take

out a license. He cannot require a person to make reports whom the law does not require to make reports, and he cannot subject one to a liability for the tax when the law does not make him subject thereto.

Of course, what has been said here is based upon our conclusion, drawn from the attached correspondence as to what is meant by "sub-agents, sub-dealers, and sub-distributors." If the facts are that those so termed do "receive" fuel as that term is defined, then they are distributors and must comply with the law, and no regulation is needed to make it applicable to them.

Conclusion

It therefore is our opinion that persons who deal in motor fuel who do not "receive" the same as that term is defined in Section 2 (g), Laws of Missouri 1943, page 673, may not be required to be licensed, make reports, or be subjected to tax liability by a rule or regulation of the administrator under the rule making power vested in him under Section 24, Laws of Missouri, 1943, page 696.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

LLB:EG

CONSTITUTIONAL LAW:
COUNTIES:

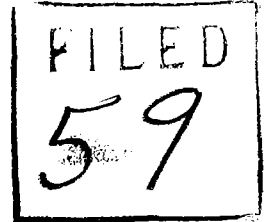
IN RE: Under Section 31, Article VI, Constitution of 1945, the City of St. Louis is recognized as a county. Under C.S.H.B. #476 the City of St. Louis would be a county of the first class and laws applicable to such counties would apply to the City of St. Louis.

October 9, 1946

F I L E D

59

Honorable David A. McMullan
Carter, Bull, Garstang & McNulty
418 Olive Street
St. Louis 2, Missouri



Dear Sir:

This will acknowledge your letter requesting an opinion which reads as follows:

"I represent Walter H. Toberman, Clerk of the Circuit Court of the City of St. Louis and kindly request an opinion from your office on the following matter.

"There was passed by the present Legislature House Bill No. 886 which provided in all counties of Class 1, the attorney filing a suit in the Circuit Court shall deposit with the Clerk of the Court \$1.00 to be used as a law library fee.

"There is a difference of opinion as to whether or not this bill, which was approved April 5, 1946, applies to the City of St. Louis. As Mr. Toberman is a state officer I believe it appropriate to request an opinion from your office as to whether or not this law applies to the City of St. Louis.

"In my opinion this law becomes effective October 7, 1946, and I would, therefore, appreciate your prompt attention to this matter."

House Bill No. 886, which was approved April 5, 1946, in part provides:

"Section 2. In all counties of Class 1, the attorney or attorneys for any party filing suit in the circuit court of such county shall at the time of filing said suit,

deposit with the clerk of said court the sum of one dollar (\$1.00) in addition to all deposits now or hereafter required by law or court rule, and no summons shall be issued until said deposit has been made; provided, that this act shall not apply to actions sent to said county on change of venue or an appeal from inferior courts, or to suits, civil or criminal, filed by the county or state or any city.

"Section 3. On the first day of each month said circuit clerk shall pay the entire fund created by said deposits during the preceding month to the judge or judges of the circuit court of the county in which such deposits were made, or to such person as the judge or judges of the circuit court of said county may designate as treasurer of said fund, and said fund shall be applied and expended under the direction and order of the judge or judges of the circuit court of any such county for the maintenance and upkeep of the law library maintained by the Bar Association in any such county, or such other law library in any such county as may be designated by the judge or judges of the circuit court of any such county; provided, that the judge or judges of the circuit of any such county, and the officers of all courts of record of any such county, shall be entitled at all reasonable times to use the library to the support of which said funds are applied."

In view of the fact that this bill pertains exclusively to counties of the first class the question propounded is whether or not it applies to the City of St. Louis. In deciding the question we must consider the applicable constitutional provisions. Section 8, Article 6 of the Consitution of 1945 provides:

"Classification of Counties--Uniform Laws.-- Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not

exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs." (Emphasis ours.)

Pursuant to the mandate of the above section, C.S.H.B. #476 was enacted by the 63rd General Assembly. This bill was passed with an emergency clause and was approved by the Governor on December 5, 1945. C.S.H.B. #476, in part, provides:

"Section 1. All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of Section 8, Article VI, Constitution of Missouri, into four classes as follows:

"Class 1. All counties now having or which may hereafter have an assessed valuation of three hundred million dollars (\$300,000,000.00) and over shall be in the first class.

* * * * *

"Section 2. For the purposes of this act, 'assessed valuation' shall mean the valuation of all real and personal property as determined and finally established by the state agency' charged with the duty of equalizing assessments.

"Section 3. For the purpose of determining the initial class of the various counties, the assessed valuations of the respective counties as set forth on pages 333 to 400 of the 'Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944' shall be used;* * *"

In order for House Bill #886, supra, to apply to the City of St. Louis, that political subdivision would have to fall within the category of counties of first class as determined by C.S.H.B.

#476. Section 31 of Article VI of the Constitution of 1945 provides:

"Recognition of City of St. Louis as now existing--The City of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the Constitution or by law, and with the powers, organization, rights and privileges permitted by this Constitution or by law."
(Emphasis ours.)

This section was not in the 1875 Constitution and is entirely new, and so far has never been judicially construed. The language in the above section is plain in stating that the City of St. Louis is now recognized both as a city and as a county, it does not appear nor is it indicated that it is recognized as a special type or class of county although as a city and for city purposes, it shall continue to function under its present charter.

The Constitution in Section 30, Article VI permits the reorganization and consolidation of the county governments of the city of St. Louis and St. Louis County and the manner in which it could be accomplished. However, until such reorganization and consolidation is accomplished they shall remain separate entities. The words "county governments" as used in this section is further recognition of the City of St. Louis as a county.

Other authority for recognizing the city of St. Louis as a county exists in Section 655, R.S.Mo 1939, in the 19th subdivision, which reads:

"* * * nineteenth, whenever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the City of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city;
* * *"

In the case of State ex inf. McKittrick v. Dwyer. 124 S.W.(2d) 1173, 343 Mo. 973, there was an action in quo warranto to determine the question of respondent's title to the office of treasurer of the city of St. Louis. The principle issue was whether or not Sections 12130, R.S.Mo. 1929 and 12130c, Laws of Missouri, 1939, were applicable to the city of St. Louis. Section 12130, supra, provided for the election of a county treasurer in the several

counties in the state and Section 12130c, supra, provided for the election of a county treasurer in counties having a population of forty thousand (40,000) inhabitants or more (except in counties having seventy-five thousand (75,000) and not more than ninety thousand (90,000) inhabitants) and in all counties of less than forty thousand inhabitants under township organization. In ruling on the applicability of these statutes to the city of St. Louis, the court said at S. W. 1. c. 1174:

"On the adoption of the 'scheme' for the separation of the city and the county, the city became both a political subdivision of the State and a city in its corporate capacity. * * *"

Again, at S. W. 1. c. 1176, the following was said:

"The word 'county', as used in Secs. 12130 and 12130c, includes the City of St. Louis, and the mayor was without authority to appoint respondent to the office of treasurer of the City of St. Louis, and he should be ousted from said office. * * *"

In the case of State ex rel. Harvey v. Sheehan, 190 S. W. 864, 269 Mo. 421, the Supreme Court in considering the applicability of a statute to the city of St. Louis, said at S. W. 1. c. 865:

"We have no doubt that under the nineteenth subdivision of section 8057, R. S. 1909, section 3508, R. S. 1909, and section 23, art. 9, of the Constitution, the term 'counties,' found in connection with the provision of the act under review and which prescribes liability for the fee mentioned, should be construed as including the city of St. Louis. * * *"

Also in the case of Fischbach Brewing Co. v. City of St. Louis et al, 87 S. W.(2d) 648, the court said, quoting from Lovins v. St. Louis, 84 S. W.(2d) 127:

"* * *The sole and only section found in the amendment which confers upon St. Louis any rights, powers, or functions as a quasi county or political subdivision of the state is section 23 (R. S. 1929, p. 131), of which the relevant part reads: "The city, as enlarged, shall be entitled to the same

representation in the General Assembly, collect the state revenue and perform all other functions in relation to the State, in the same manner, as if it were a county as in this Constitution defined." Under the maxim ejusdem generis "all other functions" must be interpreted as comprising functions of the same general nature as those specified in connection with that phrase, and the intended functioning means normal action in relation to the matter specified and others of the same nature. A county, as a governmental unit composed of the people resident within its prescribed territory, can only function concerning affairs committed to it as a governmental unit. It has nothing to do with the purely corporate or nongovernmental affairs of the city as such and no functions concerning them to perform. The city of St. Louis, in so far as its county functions extend, is coequal in that respect with all other counties in the state but not different therefrom. Constitutionally, while St. Louis in its entirety is of a dual nature, it is in no sense either a super-city proper or a super-county.* * *" (Underscoring ours.)

To further sustain the recognition of St. Louis city as a county, we refer to the Journal of the Constitutional Convention regarding the meaning of Section 31, Article VI, supra, where, on the 139th day, May 11, 1944 at page 2205, it was said:

"MR. PHILLIPS(of ST. LOUIS CITY) MR. PRESIDENT, this amendment--the purpose of this amendment is to recognize the distinction between the city of St. Louis as a city and the city of St. Louis as a county, * * *"

Again, on page 2206, Mr. Phillips said:

"MR. PHILLIPS: Now I for one know the previous history of the attempt to get St. Louis County and St. Louis City as counties to consolidate. * * * I do think that the way ought to be left for St. Louis to stay just where it is as a county and to expand as a city into any other county just like any other city of the state."

Section 8, Article VI, supra, provides that the number of classes of counties shall not exceed four and that their classification shall be made by general law. Since the City of St.

Louis does not appear to be recognized as a special class of county in Section 31, Article VI supra, it is therefore, our notion that it would have to fall within one of the four classes fixed by the Legislature. To hold otherwise and say that the City of St. Louis is a special class of county, or possibly a county of the 5th class, would be in conflict with the Constitution. To hold that the City of St. Louis as a county would fall within one of the four classes would eliminate the possibility of conflict between the section of the Constitution providing for the classification of counties and the section recognizing the City of St. Louis as a county. Such an interpretation would tend to better harmonize those two sections.

The Legislature has provided in C.S.H.B. #476 that all counties having an assessed valuation of 300,000,000.00 dollars and over shall be in the first class and for the purpose of determining the classes of the various counties the assessed valuation of the respective counties as set forth on pages 333 to 400 of the Journal of the Board of Equalization of the State of Missouri for the Year Ending December 31, 1944, shall be used. On page 400 of the Journal the assessed valuation of the City of St. Louis is given to be 1,211,440,991.00 dollars. Therefore, the City of St. Louis being recognized as a county meets the qualifications to put it within the category of counties of the first class.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the City of St. Louis is recognized as a county, and as such would be classified as a county of the first class as provided in C.S.H.B. #476. House Bill #886, pertaining to counties of the first class, would apply to the City of St. Louis.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:mw

SCHOOLS: School districts cannot issue bonds to buy school busses.

6
1-22
January 16, 1946

FILED

60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This office has received your request for an opinion, which reads as follows:

"I would appreciate an opinion of your office whether or not a small town school district was permitted under the law to vote and issue bonds in order to purchase school busses."

The applicable Constitution provision permitting a school district to incur indebtedness is Section 26 (b), Art. 6, of the Constitution of 1945. This section reads as follows:

"Any county, city incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

The statutory authorization for the Board of Directors for any school district to borrow money and issue bonds for payment thereof is Section 10328, Art. 2, Chap. 72, R.S. Mo., 1939, which in part, reads as follows:

"For the purpose of purchasing school-house sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors

shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. * * *

The above quoted section is clear in specifically naming the purposes for which money can be borrowed by the Board, and for payment thereof, bonds may be issued.

In *Beauchamp vs. Consolidated School District No. 4 of Livingston County* 247 S.W. 104, 297 No. 64, money was borrowed and bonds were issued for the purpose of remodeling a school house. The appellant claimed that the statute did not include as a purpose, "remodeling". In deciding the question, the following was said at l. c. 71:

"* * *The statute does authorize bonds 'for the purpose of . . . 'erecting schoolhouses . . . and furnishing the same, and building additions to and repairing old buildings.' According to the dictionaries the word 'remodel' has, as the only one of its legitimate meanings which could be applicable here, the meaning 'to re-construct.' In fact, there is nothing included in the word in the sense in which it can be applied to existing buildings in a situation like that in this case which is not within the statutory language 'erecting schoolhouses . . . and building additions to and repairing old buildings.' Appellant's construction, like a similar one in an almost identical case (*Cotter v. Joint School District*, 164 Wis. l.c. 15), is, as the Supreme Court of Wisconsin said, 'too narrow. The statute was intended to enable school districts that did not have adequate schoolhouses to obtain them by purchase or erection, and it should receive a liberal construction to effectuate that purpose. The remodeling of a building is more than repairing it or making minor changes therein. The ordinary significance of the term imports a change in the remodeled building practically equivalent to a new one . . . The inclusion of an old structure into a practically new one does not take the process out of the meaning of the term 'erection,' used in a broad sense.' The purpose named

within the order was within the statute and was sufficiently conveyed to the voters by the same language used in the notice."

To issue bonds for the purpose of buying school busses is far removed from the purposes set forth in Section 10328, supra, and though the statute should receive a liberal construction, we think that the purpose of buying school busses can in no wise be brought within the ambit of the statute.

Attention is directed to Section 10326, R. S. Mo., 1939, which provides as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the school-house, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; Provided that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 10361. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for

that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district: Provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit." (Underscoring ours)

The statute clearly provides that when transportation for school children is authorized, it shall be arranged for by the Board of Directors and paid for out of the incidental fund of the school district. School busses used as a means of transporting children to school would have to be purchased with the money in the incidental fund.

The incidental fund is provided for in Section 10366, Laws of Missouri, 1943, page 893, which repealed and reenacted Section 10366, R. S. Mo., 1939. This section, in part, provides as follows:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the President and the Secretary or Clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness."

* * * * *

"* * * Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to Incidental Fund. * * *

CONCLUSION

Therefore, it is the opinion of this department that the purposes for which bonds may be issued by the Board of Directors of any school district, as set forth in Section 10328, R. S. Mo., 1939, do not include the purchase of school busses.

School busses are a means of transportation for school children to and from school, and must be authorized in the manner prescribed in Section 10326, R. S. Mo., 1939, and paid for out of the incidental fund of the school district, which is provided for in Section 10366, Laws of Missouri, 1943.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:dc

DRAINAGE DISTRICTS: In a county having township organization the County is liable for assessed benefits to roads in a drainage district which was organized under the County Court Drainage law.

February 4, 1946

FILED

61

Mr. L. E. Merrill
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Merrill:

This will acknowledge receipt of your letter of January 25, 1946, in which you request an opinion of this department, as follows:

"The County Court of Chariton County, Missouri, desires your opinion on the following:

In a County having Township organization, is the County or Township liable for assessed benefits to roads in a drainage district organized by the County Court?"

In Bates County Drainage District No. 1 vs. Bates County (1916) 269 Mo. 78, the Supreme Court of Missouri held that the assessment of benefits accruing to public roads and highways situated in Bates County, which, at that time, was under township organization, were to be made against the County of Bates since the drainage district had been organized under the county court drainage law. The question was not raised in that case as to whether it was the county or the township which was liable for said assessed benefits.

In Harrison and Mercer County Drainage District vs. Trail Creek Township (1927), 297 S. W. (1) 317 Mo. 933, the Supreme Court of Missouri held that the assessment of benefits to public roads and highways in Harrison County, Missouri, should be made against the township within which the roads benefited were situated, where the drainage district was organized under the Circuit Court Drainage laws. In discussing the precise point presented by your letter of January 25, 1946, the Supreme Court of Missouri said: (l.c. 944 and 945)

"In Drainage District v. Bates County, 269 Mo. 78, the proceedings leading to the incorporation of the plaintiff drainage district, and the assessment of benefits accruing to the private lands and public roads and high-

ways situate therein, were had in the County Court of Bates County, under and by virtue of what is commonly called the County Court Drainage Law. (Art. 4, Chap. 41, R. S. 1909, and amendments thereto.) Section 5591, Revised Statutes 1909, which was then a part of the so-called County Court Drainage Law, provided: 'When any ditch established under the provisions of this article (i.e., Art. 4, chap. 41 R. S. 1909) drains, either in whole or in part, or benefits any public or corporate road or railroad, the viewers shall apportion to the county, if a county or state or free turnpike road, or if a corporate road or railroad, to the company owning, operating or controlling the same, the same proportion of the cost of location and construction of the improvement in proportion to the benefits received as to private individuals.' (Italics ours.) Construing therefore, the precise statute involved in the Bates County case, this division of this court therein ruled, in substance and effect, that the so-called County Court Drainage Law therein involved did not provide that public roads and highways shall be assessed for benefits accruing thereto by reason of the drainage improvements and reclamation plan, but, on the other hand, specifically provided that the benefits accruing to the public roads and highways shall be apportioned to the county in which such public roads are situate;* * *

* * * * *

"* * * But it is clearly apparent, from the above language used by Judge Graves, the author of the opinion in the Bates County case, that the remedy by action, and a general judgment therein, was properly against Bates County because the statute under construction in that case, by its precise terms, laid the liability and obligation for the payment of benefits accruing to the public roads and highways upon the county itself, and upon no other political or governmental subdivision of the State."

The court said further at l.c. 949:

"But it is said by defendant organized township herein that Bates County had adopted, and was under, township organization at the time of our ruling and decision in the Bates County case, supra, and that we ruled therein that Bates County, as the unit of government, was liable for the benefits accruing to the public roads and highways situate within that county. But, as we have pointed out herein, the drainage district proceedings in the Bates County case were had under and by virtue of the County Court Drainage Law, and not under the Circuit Court Law, and the County Court Law, by its terms, did not provide for the assessment of benefits directly against the public roads and highways, but specifically provided that the accruing benefits shall be apportioned to the county. Hence, even though Bates County had adopted township organization, the county itself was held liable for the payment of benefits accruing to the public roads and highways therein because the drainage act therein involved and under construction specifically directed and provided that the benefits are to be apportioned to (and paid by) the County, and to no other unit of government or political subdivision of the State. The distinction between the Bates County case and the instant case, we believe, is readily apparent."

Section 5591, R. S. 1909, which was the basis of the court's decision in the Bates County case, and which is also referred to in Harrison and Mercer County Drainage District v. Trail Creek Township, still remains, without change, a part of the County Court Drainage laws. It is now designated Section 12430, R. S. Mo. 1939, Mo. R.S.A., p. 699.

We are of the opinion that Bates County Drainage District Number 1, v. Bates County, supra, and Harrison and Mercer County Drainage District v. Trail Creek Township, supra, effectively ruled the instant question.

CONCLUSION.

It is, therefore, the opinion of this department that, in

Mr. L. E. Merrill

-4-

a county having a township organization, the county and not the township is liable for assessed benefits to roads and highways located in a drainage district which was organized by the County Court under the County Court Drainage Law.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

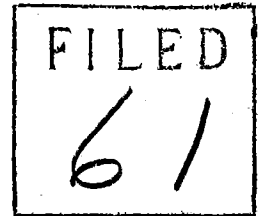
SNC:DC

APPROVED:

J. E. TAYLOR
Attorney General

POOL HALLS: Club operating pool hall and
charging members for use of
cues must procure license.

March 29, 1946



H-2

Honorable L. E. Merrill
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

We have received your request for an official opinion,
which reads as follows:

"I desire your opinion as to the
interpretation of Section 15405
EXCEPTIONS TO 15397 LAWS OF MISSOURI
1941. Parties operating a pool hall
without license in a city, organ-
ized a club selling membership cards
for a small fee. Proprietor charges
a small fee for the use of a cue.

"QUESTION: Is the charge for the
use of the cue a charge for playing
within the meaning of this section
and therefore a violation?"

Section 15397, R. S. Mo. 1939, empowers the County Court
to license keepers of pool and billiard tables, and in part
provides as follows:

"The county court shall have power
to license the keepers of billiard
tables, pigeonhole tables, jenny
lind tables, and all other tables
kept and used for gaming, upon
which balls and cues are used. * * *"

(Emphasis ours.)

Section 15405, R. S. A., provides as follows:

"This chapter shall not apply to any person having set up in his own private residence any one of such tables mentioned in Section 15397, when used for his own private use, and for the use of his family, nor to clubs where pool, billiard and other tables are used exclusively for club members and upon which no charge for playing is made."

This section enumerates certain exceptions to Section 15397, supra, under which no license is required to keep and operate pool and billiard tables.

For a club, such as you describe in your letter, to be excepted from procuring a license to keep and operate pool and billiard tables, two requirements must exist, as provided by Section 15405, supra. The tables must be used exclusively for club members and there must be no charge for playing.

We assume that the only persons using the pool tables, in the case at bar, are those holding membership cards. Consequently, the first requirement is fulfilled, in that the tables are exclusively used for club members.

According to the facts, the proprietor, who apparently is also connected with the club, charges the players a small fee for the use of the cues. It is our notion that to play or participate in the various games played on pool or billiard tables, the use of a cue is necessary and without a cue the playing of such games cannot be accomplished.

Conclusion.

It is the opinion of this department that a club keeping and operating pool and billiard tables exclusively for members, but charging a fee for the use of a cue, is making a charge for playing within the meaning of Section 15405, R. S. A., and therefore is not excepted from procuring a license.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

RFT:ml

ELECTIONS: A person is entitled to the whole of the last day allowed by law to file for office, and it is the duty of the county clerk, or deputy, to be available all of this day.

May 18, 1946



Mr. Leo Mitchener
Clerk of the County Court
Ripley County
Doniphan, Missouri

Dear Sir:

We acknowledge receipt of your letter of May 9th, 1946, requesting an opinion of this department, which is as follows:

"On Tuesday April 30th, I was in, and kept my office open until a few minutes past the usual closing time, after which I was out of town. Later a man desiring to file for county office went to my residence, having his receipt for filing fee properly signed by Treasurer of Central Committee. Although my wife was at home, he did not leave his declaration and receipt for filing fee at my residence, but later (presumably prior to 12 o'clock midnight) mailed his declaration to me, but it was postmarked 9:30 A.M. May 1st.

"I desire an opinion from you on the following questions:

"(1) Am I required to keep the office open or to be on call after the usual closing time?

"(2) Is the above mentioned candidate legally filed and can I legally place his name on the ballot?

"An opinion at your earliest convenience will be appreciated."

Mr. Leo Mitchener

(2)

The question presented is whether, under the facts as outlined by your letter, the man seeking to file for a county office has complied with Section 11550, Laws of 1944, Extra Session, page 25, Par. 1, and Section 11553, R. S. Mo. 1939, and is entitled to have his name printed on the official ballot for the August 6th primary election of 1946.

Section 11550, Laws of 1944, Extra Session, page 25, provides:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

"I, the undersigned, a resident and qualified elector of the (..... precinct of the town of), or (the precinct of the ward of the city of), or the precinct of township of the county of and State of Missouri, do announce myself a candidate for the office of on the ticket, to be voted for at the primary election to be held on the first Tuesday in August,, and I further declare that if nominated and elected to such office I will qualify."

Section 11553, R. S. Mo. 1939, provides:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows:

"1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state.

"2. For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the city of St. Louis."

The case of State ex rel. Haller v. Arnold, 277 Mo. 474, 210 S.W. 374, established the doctrine that a person is entitled to the whole of the last day allowed by law to file his declaration for office. In this case the official who was required by law to accept and receive the filing fee was absent from his office, and the person attempting to pay said fee was unable to find him about the city. The next day the official was in his office, the filing fee was paid, but the Board of Election Commissioners refused to place the man's name on the official ballot. The court held that he was entitled to have his name placed on the ballot and, in so holding, said, 1. c. 481, 482:

"It is manifest that any eligible candidate for office is entitled to the whole of the last day allowed by law within which to submit himself to the electors for their suffrages. In a case like this, where the proposed candidate is in no wise at fault (the argument that he should have made up his mind earlier obviously having no weight, by reason of the truth of the premise last above) ought he to be deprived of the privilege of running for a public office by the mere adventitious fact of the absence from his office, or from the city, or from the state, of the only officer from whom the required official receipt can under the letter of the law be obtained? The Treasurer might be ill, or a case can be imagined where the death of the Treasurer might occur on the last day for

filing prescribed by the letter of the statute, and wherein it would be impossible to appoint his successor in time to have such successor accept the required deposit and issue the required receipt therefor.

"In such case, the untrammelled constitutional privilege of all eligible persons to become candidates for office requires us--if we are to escape holding this statute invalid for that it contravenes the spirit and the letter of the Constitution in denying this privilege--to say that if the proposal candidate be in no wise in default, and the death of the Treasurer, or the latter's illness, or his absence from his office, from the city, or from the State, shall prevent the making of the required deposit and the obtention of the required receipt on the day prescribed by the letter of the statute, all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt; provided, such filing of the receipt shall be in time to allow of the performance by the Board of Election Commissioners of the very first of the ensuing duties incumbent upon them by law.

The above doctrine has been upheld in the case of State ex rel. Muse v. Haden, County Clerk, 349 Mo. 982, 163 S.W. (2d) 946. In this case the person attempting to file for office had his receipt for filing fee and made an honest and reasonable effort on the last day for filing, from about seven o'clock p.m. to almost midnight, to locate the county clerk at both his office and his home. It was admitted that no effort was made until after the usual closing hours of the county clerk's office, wherein it was required to file as required by Section 11553, supra. The court, in holding that the county clerk must place the man's name on the official ballot, stated, l. c. 948:

"Indeed, respondent concedes in his brief that under the law prospective

candidates have 'the right to file up until midnight,' and so the question of whether it was the custom and practice in said county for the county clerk to keep his office open until midnight on the last day for filing is of no consequence. As a matter of fact the Commissioner found that issue against relators. The further finding of the Commissioner was that there was no evidence that either the clerk or deputy intentionally or purposely avoided being located. But if a candidate has the whole of the last day within which to file, it necessarily follows that it is the clerk's duty to be available, either in person or by deputy, during that period, and as the Commissioner has found as a fact that they were not so available, we hold what was done by relators in the premises constituted a substantial compliance with the statutes."

(Emphasis ours.)

It can readily be seen from the above quotation, that not only does a candidate have the whole of the last day in which to file, but that it is the clerk's duty to be available, either in person or by deputy, during that period.

Conclusion

Therefore, it is the opinion of this department that (1) the man referred to in your letter is entitled to have his name printed on the official ballot for the August 6th, primary election of 1946, and that (2) it is the duty of the County Clerk to be available, either in person or by deputy, the whole of the last day in which a candidate may file.

Respectfully submitted,

APPROVED:

PERSHING WILSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

PW:CP

JAILS: Building jail and constructing vaults are
CONTRACTS: separate projects, to be paid for out of
COUNTY COURT: separate funds, and contracts for each
project must be let to lowest bidder.

June 26, 1946



Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an official opinion, and reading as follows:

"Our circuit court, under the authority of Sec. 11041, being satisfied that a necessity then existed for the assessment, levy and collection of taxes for the erection of a jail, commanded the county court of St. Clair County to have the necessary assessment, levy and collection of taxes for the purpose of erecting a jail, made.

"This was done and a substantial fund has thus been created. The circuit court in its order expressly directed that no portion whatever of this jail fund should be diverted or used for any other purpose.

"In the light of this prohibition, it seems clear that none of the existing jail fund can be used for much-needed record vaults and other desirable improvements which the court would like to have installed.

"This county owns an antiquated and inadequate jail - built in 1867. It has no detention room for juveniles as has long been required by statute; neither does it have a cell where a woman prisoner can be incarcerated.

"The present jail location, while owned by the county, is so undesirable and the local sentiment against using the site for a new jail,

that the county court favors building the proposed jail which will include living quarters for the sheriff and his family, storage room for his car, etc., as an addition to the present court house on the courthouse square, in Osceola, the county seat.

"The question is - and the court will greatly appreciate your opinion on it -:

"Can the county court, while erecting the jail as an addition to the present court house, also, at the same time and under the same contract, safely erect and complete, out of funds other than the special jail fund, vaults for the storage of public records, suitable rooms for the same and other related improvements?

"The county court feels that it will be desirable, from the standpoints of economy and the securing of a uniform, satisfactory and presentable building, that all the proposed work be advertised, let, superintended, erected and completed under one contract by the same bonded contractor, the cost of the jail to be paid out of the special jail fund and the cost of the record vaults and other related improvements to be paid out of the general revenue or other fund.

"Is there any legal objection to this arrangement?

"I will greatly appreciate the opinion of your office on this proposition."

A careful study of the facts in your request indicates that there are two distinct and separate construction projects to be completed. One is the erection of a county jail, and the other is the building and installation of vaults and suitable rooms which will be used for the storage of public records.

Under the authority of Section 11041, R. S. Mo. 1939, the Circuit Court of St. Clair County ordered the county court of that county to have an assessment, levy and collection of taxes made; and, in compliance with such order, a particular fund was

created for the sole purpose of erecting a jail.

Since, under the order of the court, none of the jail fund can be used for any other purpose, the necessary expense to be incurred in installing vaults and suitable rooms for the storage of public records must be paid from another separate fund.

The question is asked: Can both construction projects be completed under one and the same contract?

Article 4, Chapter 100, R. S. Mo. 1939, pertains to the erection and maintenance of county buildings. Section 13702 of this article provides:

"There shall be erected and maintained in each county, at the established seat of justice thereof, a good and sufficient court house and jail."

Section 13715 provides:

"Whenever the county court of any county shall think it expedient to erect any of the buildings aforesaid, the building of which shall not be otherwise provided for, and there shall be sufficient funds in the county treasury for that purpose, not otherwise appropriated, or the circumstances of the county will otherwise permit, they shall make an order for the building thereof, stating in such order the amount to be appropriated for that purpose, and shall appoint some suitable person to superintend the erection of such buildings, who shall take an oath or affirmation faithfully and impartially to discharge the duties enjoined on him by this article."

Section 13723 provides:

"When the ground for erecting any public building shall be designated, as aforesaid, the superintendent shall prepare and submit to the county court a plan of the building to be erected, the dimensions thereof, and

the materials of which it is to be composed, with an estimate of the probable cost thereof."

Section 13724 in part provides:

"When any plan shall be approved by the county court, the superintendent shall immediately advertise for bids for the erection and construction of same, stating in such advertisement a description of such building or buildings, and shall contract with the person or firm who will agree to do the work and furnish the necessary material on the lowest and best terms not exceeding the amount appropriated or set apart for such building or buildings: * * * * *

The sections just quoted only pertain to the erection of public buildings. Regarding plans for erecting a jail, which is a public building, Section 13724, supra, would have to be complied with. The superintendent must advertise for bids for the erection and construction of such a building, and must contract with the person or firm who agrees to do the work on the lowest and best terms not exceeding the amount appropriated for the building.

Section 13730, R. S. No. 1939, empowers the county court to make repairs and improvements on public buildings, which would include the installation and construction of vaults and suitable rooms for storage space. This section reads:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

In the case of State ex rel. Carter v. Bollinger, 117 S. W. 1132, 219 Mo. 204, a suit was brought by certain taxpayers of Stoddard County to prohibit the county court from building a vault and repairing the court house. In ruling that the county court could make such improvements and repairs, the court said at S. W. 1. c. 1137:

"* * * * Section 6736, Rev. St. 1899 (Ann. St. 1906, p. 3322), reads as follows: 'The county court of each county shall have the power from time to time to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall moreover take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.' Clearly that section of the statute gives the county court of Stoddard county jurisdiction over the subject-matters complained of in the petition; and the pleadings, evidence, and report of the referee filed herein disclose the fact that the county has sufficient money on hand with which to pay for the proposed improvements. That being true, then the county court of that county was acting within its jurisdiction, and prohibition will not lie.
* * * *"

Although Section 13730, supra, empowers the county court to construct vaults and rooms for storage space, we find no provision in Article 4, of Chapter 100, requiring the county court to advertise for bids to make such improvements and letting the contract to the lowest bidder, as is required in the case of erecting a public building. However, in Article 2, Chapter 73, R. S. Mo. 1939, which pertains to the county budget law, Section 10932 in part provides:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer. No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of

the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating: Provided, that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it shall be sufficient for the accounting officer to certify that such bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of such bonds yet to be sold or of such taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least 500 copies per issue, if there be such, except that such advertising shall not be required in case of contracts or purchases involving an expenditure of less than \$500.00, in which case notice shall be posted on the bulletin board in the courthouse. * * * * * (Emphasis ours.)

This section and Section 13730, supra, are not repugnant to each other and relate to the same subject matter. Therefore, they are considered to be in pari materia, and should be construed together. *Soble v. Hermann*, 9 S. E. (2d) 459, 175 Va. 489.

In *Layne Western Co. v. Buchanan County*, 85 Fed. (2d) 243, the County of Buchanan was sued on a contract entered into with the defendant through the County Planning and Recreation Commission. The plaintiff had been given the contract to drill two wells without there having been any advertisement for bidders. The County Planning and Recreation Act empowered the Commission to construct and maintain improvements pertaining to the development of recreational projects, but nothing in the act required advertising for bids when any construction work was to be done. A judgment adverse to the plaintiff was rendered, because that portion of the county budget law pertaining to the execution of

contracts and specifically relating to letting contracts to the lowest and best bidder was not complied with. In the opinion of the court, it was said at l. c. 346 that:

"* * * * The Budget Act clearly applies to the county court, and it follows that it applies also to all agencies of the court.
* * * * *"

And at l. c. 347 appears the following:

"Finally, the appellant contends that the Commission Act is a special act, and therefore must take preference over the Budget Act, which is general. If there were any repugnancy between the two acts, the contention might have merit. The Commission Act, however, nowhere says that competitive bidding may be dispensed with in contracts made by the commission. The rule is applicable, therefore, that where statutes are in pari materia they are to be construed as one system and governed by one spirit and policy. *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 214, 54 S. Ct. 402, 78 L. Ed. 755; *Kornin v. City of Coquille*, 143 Or. 127, 21 P. (2d) 1073, 1080, and *Tragessor v. Cooper*, 313 Pa. 10, 169 A. 376, 377, are cases analogous to the instant case. In each of the cited cases there existed a general statutory or charter provision prescribing a method of letting contracts by competitive bidding. The immediate provision empowering the governmental agency to contract lacked these requirements. It was held, however, that the officers who had made the contracts in question could act in the premises only so long as they kept within the competitive bidding requirements expressed in the general statute or the charter because such requirement constituted an expression of public policy which need not be repeated in the particular statute or charter and that it could not be excluded unless an intent to exclude clearly appeared.

"It is clear in this case that it was the intent of the Legislature of Missouri in enacting

the County Budget Law and including therein the requirement that 'all contracts' should be let upon competitive bidding to declare a public policy. That such a policy is wise is evidenced by the universality of such statutes found in the laws of Congress and of all the state Legislatures. At any rate, it is for the Legislatures and not the courts to pass upon their wisdom."

Therefore, applying the rule laid down in this case, it would not be proper to let a contract for the separate project of constructing vaults and rooms for storage without first advertising for bids and letting such contract after due opportunity for competitive bidding to the lowest and best bidder. Furthermore, it would be in violation of Section 39 (4), Article III, of the Constitution of 1945, to pay a claim under a contract let for this particular construction project without having competitive bidding on the job, as provided by statute. This section provides as follows:

"The general assembly shall not have power:

"(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law;"

CONCLUSION

It is, therefore, the opinion of this department that for the two separate construction projects, to wit: Building a jail and constructing vaults and rooms for storing public records, there would have to be an advertisement for bids incorporating a description of the two projects, so as to give interested persons or firms an opportunity to bid competitively on such projects separately or on both. The contracts would have to be let to the lowest bidder on each project, which would necessarily require separate contracts, if the lowest bidder on the building of the jail and constructing the vaults and storage rooms were separate individuals. If the lowest bidder on both

Hon. Edwin W. Mills

-9-

projects was the same person, both projects could be completed under one contract; but, since the money to pay for the completion of each project must come from separate funds, the contract should be divisible in form, keeping separate the description of the work to be done relating to each project, and separately indicating the amount of money to be expended on each project, specifying the fund from which the money is to come.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:LR

RECORDER OF DEEDS:
CONSTITUTION:

Compensation of incumbent recorders in counties of the second class not to be increased as provided in House Bill No. 897 during present term of office. Should reappoint deputies.

July 11, 1946

FILED

62

Honorable John W. Mitchell
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"I should like your official opinion as to whether or not, beginning July 1, 1946, the recorder of deeds in Buchanan County shall be paid in accordance with the provisions of House Bill No. 897 or whether he shall be paid according to the provisions of Sec. 13487, R. S. Mo. 1939, which is the present statute on that subject.

"I should also appreciate your advising us whether, in your official opinion, it is necessary for the recorder of deeds and the county court, pursuant to Section 3 of that Bill, to re-appoint deputies for that office. At the present time the deputies have been appointed and are classified under the provisions of Sec. 13489, R. S. Mo. 1939."

We shall discuss the problems presented in the order that they appear.

That part of House Bill No. 897, with which your first question is concerned, is Section 1, and it provides:

"Section 1. The recorder of deeds, in counties of the second class, shall keep a full, true and faithful account of all fees of every kind received, and shall make a report thereof every year to the county court. He shall retain, as compensation for his services as county recorder, out of the fees received by him, a sum not in excess of \$4000.00 for each year of his official term, and all fees received by him over and above the sum of \$4000.00 for each year of his official term, shall be paid by him into the county treasury, to form a part of the jury fund of the county."

According to this, a recorder of deeds, in counties of the second class, could receive compensation up to \$4000.00 per year. However, by virtue of Section 13487, R. S. Mo. 1939, the recorder of deeds is paid \$3500.00 per year. At the time the incumbent recorder of deeds' term of office started, his salary was determined as being \$3500.00 per year under this last section. The question to be determined is whether the incumbent recorder of deeds is to receive \$4000.00 per year under House Bill No. 897, or \$3500.00 per year under Section 13487, R. S. Mo. 1939, after July 1, 1946.

The Constitution of Missouri, 1945, Article 7, Section 13, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This section is patterned after Article XIV, Section 8 of the Constitution of Missouri, 1875.

In the case of State ex rel. Harvey vs. Sheehan, 190 S. W. 364, 269 Mo. 421, wherein the Legislature enacted a law requiring the circuit attorney of the City of St. Louis to attend coroners' inquests in cases of death caused by violence, which might result in charges of felony, an act

he was not previously required to do, and for such attendance the circuit attorney should receive \$10 for each request to be paid by the city. It was claimed that since the circuit attorney was an officer at the time of the passage of the Act, he could not receive this amount since the Constitution prohibited any increase in the pay of an officer during his term of office. The Supreme Court of Missouri, l. c. 429, held:

"* * * We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 135 Mo. 270; State ex rel. v. Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 39; State ex rel. v. McGovney, 92 Mo. 428; County v. Felts, 104 Cal. 60; State ex rel. v. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Funnell v. Mann, 105 Ky. 37; Lewis v. State ex rel. 21 Ohio C.C. 410.)

"It is our opinion that the act is valid and that the appellant is entitled to the fees demanded and that the respondent was not justified in refusing to audit the account and draw a warrant therefor on the city treasury."

In this case the increase was allowed since a new duty had been imposed. Cases applying the same rule are Donnelly v. Silvey, 302 Mo. 365; Little River Drainage District v. Lassater, 29 S. W. (2d) 716, 325 Mo. 493, and cases cited therein.

Before the incumbent recorder of deeds could be entitled to collect the \$4000.00 provided by House Bill No. 897, it would be necessary for new duties to be placed upon that office, such as would bring him within the rule of the cases just cited. We are unable to discover any new duties that have been added under House Bill No. 897. In that event, Article 7, Section 13, Constitution of Missouri 1945, supra, is controlling, and the incumbent recorder of deeds may only receive \$3500.00 per year as provided by Section 13487, R. S. Mo. 1939. His successor in office would be entitled to the larger amount as provided in House Bill No. 897.

Turning to your second proposition, Section 3 of House Bill No. 897 provides:

"Section 3. The recorder of deeds, in counties of the second class, shall be entitled to appoint such deputies as the recorder of deeds, with the approval of the county court, may deem necessary for the prompt and proper discharge of the duties of his office. Such deputies shall possess the qualifications of clerks of courts of record, and may, in the name of their principal, perform the duties of the recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. The deputies, appointed as herein provided, shall receive such salaries as may be fixed by the recorder of deeds, with the approval of the county court, and shall be paid out of the county treasury in twelve equal monthly installments. The appointment of every deputy shall be in writing, endorsed with an oath of office, similar to that taken by the recorder and subscribed to by the deputy appointed, and filed by the recorder of deeds with the county court."

This section is at considerable variance with Section 13489, R. S. Mo. 1939, which provided:

"The collector of revenue, clerk of the circuit court, assessor, recorder of deeds, county treasurer, and any other county officer, shall each be entitled to such a number of deputies and assistants, to be appointed by said county officer, as the county court may deem necessary for the prompt and proper discharge of the duties of their various offices, and such deputies and assistants shall be divided into classes as follows, and be paid in the same manner as the officers: Class A, assistants or deputies; class B, assistants or deputies; class C, office clerks and copyists. Class A assistants or deputies shall be paid sixteen hundred and eighty dollars per year. Class B assistants or deputies shall be paid fifteen hundred dollars per year. Class C office clerks and copyists shall be paid twelve hundred dollars per year."

In Section 3 of House Bill No. 897, the recorder shall appoint as many deputies as he deems necessary, while under Section 13489, R. S. No. 1939, there were to be as many deputies as the county court deemed necessary. There were no qualifications to be met under Section 13489, while under House Bill No. 897, the deputies must possess the qualifications of clerks of courts of record. An oath of office is required under House Bill No. 897, whereas none was required under Section 13489. This would lead to the conclusion that, since the new law does require more than the old, the recorder of deeds should reappoint deputies for that office.

CONCLUSION

It is, therefore, the opinion of this department that the incumbent recorder of deeds in counties of the second class may not receive an increase in compensation as provided by Section 1 of House Bill No. 897 during this term

Hon. John W. Mitchell

-6-

of office due to the restriction of Article 7, Section 13, Constitution of Missouri 1945; and he, therefore, is limited to receiving \$3500.00 per year as provided by Section 13489, R. S. No. 1939.

It is our further opinion that the recorder of deeds in such counties should, under Section 3 of House Bill No. 897, reappoint deputies for that office.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JHA:LR

ELECTIONS:
BOND ISSUE:

A bond issue for a county hospital may
be submitted at a primary election.

April 26, 1946

FILED

63

4/29

Honorable Roscoe D. Moore
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion which reads as follows:

"There has been a petition filed with the County Court under Sec. 15192 R.S. 1939, asking the county court to call an election on a bond issue for a county hospital at the Primary Election to be held August 8, 1946. As I read this statute and also Sec. 15193 it seems to me at least very doubtful that an election for this purpose could be held on primary election day. Would you please give me your opinion whether or not an election for this purpose could be held on primary election day? I would need this opinion by April 30th."

Section 15192, R.S. Mo. 1939, provides that any county may establish a public hospital upon a petition signed by one hundred residents of said county being submitted to the county court and "such county court shall submit the question to the qualified electors of the county at the next general election to be held in the county, or at a special election called for that purpose."

Section 15193, R.S. Mo. 1939, provides, in part, as follows:

April 26, 1946

"The county court shall submit to the qualified electors of the county, at a regular or special election, the question whether there shall be levied upon the assessed property of such county a tax of _____ mills on the dollar for the purchase of real estate for hospital purposes and for the construction of hospital buildings, and for the maintenance of same, or for either or all of such purposes. The ballots to be used at any election at which the hospital question is submitted, shall be printed with a statement substantially as follows:

"For a _____ mill tax for a bond issue for a public hospital and for maintenance of same.

Yes.

No.

*****."

The identical question presented in your request was before our Supreme Court in *Dysart vs. City of St. Louis*, 321 Mo. 514, 11 S.W. (2d) 1045. The facts in that case as given by the Court were as follows:

l.c. 1046:

"The plaintiff, a resident and taxpayer of the city of St. Louis, brought this suit to restrain the city of St. Louis, the mayor, comptroller, and treasurer, from issuing and delivering certain bonds voted upon at an election held in St. Louis August 7, 1928, the date of the regular primary provided by law.

The Court in that case held that elections are divided into two classes, general and special. A special

April 26, 1946

election being one called for a special purpose, while a general election is one fixed by law to occur at regular intervals. The Court further broke down general elections into primary elections and regular, or final, elections. The Court further pointed out that what is now Section 655, R.S. Mo. 1939, which defines general election as "the election required to be held on the Tuesday succeeding the first Monday of November, biennially", was passed before the enactment of the general primary law which, therefore, could not have been included in the definition of general election.

The Court in conclusion, l.c. 1053, said:

"* * * A proposition to issue bonds may be submitted at a regular primary election, and such submission does not constitute it a special election.

"It is a matter of common knowledge that at nearly every general election propositions are authorized and submitted to the voters as special propositions. Submissions of these special propositions are not, in common parlance, called special elections. They are merely votes on special propositions submitted at a general election."

This view is confirmed by a reading of the two above quoted statutes, because it will be noted that in Section 15192, supra, the term "general or special election" is used, while in Section 15193 the words "regular or special election" are used.

The Legislature by such phraseology clearly indicated that when they used the term "general election" they did not mean it in its commonly accepted meaning of the election held on the Tuesday succeeding the first Monday of November, but rather used it in contradistinction from the term "special election".

CONCLUSION.

It is, therefore, the opinion of this Department that a proposition to issue bonds for the building of a

Honorable Roscoe D. Moore

-4-

April 26, 1946

county hospital under Sections 15192 and 15193, R.S.
Mo. 1939, may be submitted at a regular primary elec-
tion.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

MARRIAGE: Marria when rformed
after expiration of license date.

FILED

63

August 2, 1946

27

Mr. Alfred E. Hoeller
Prosecuting Attorney
Ste. Genevieve County
St. Genevieve, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"Section 3364A (Laws of Missouri 1943
Page 641) contains a provision that a
marriage license shall be void after
ten days from the date of issuance.

"Section 3364C (Laws of Missouri 1943
Page 642) contains a provision that
the validity of any marriage under the
act shall not be impaired by any vio-
lations under Section 3364A.

"The Recorder of Deeds of this County
has reported to me that the returns on
several licenses issued by his office
show that the marriages were performed
more than ten days after the date of
the issuance of the license. He wants
to know whether these marriages are
void under Section 3364A, or whether
they are validated under the provisions
of Section 3364C."

Replying thereto, your question appears to be this, is
a marriage void where the contracting parties have complied
with all of the law, except that the marriage ceremony was
performed more than ten days after the issuance of the license.

Your question is evidently based on that provision in
Section 3364-A, Laws 1943, page 641, which, in speaking of the

marriage license required of those who contemplate marriage, provides:

" * * * * said license shall be void after ten (10) days from the date of issuance."

The courts in Missouri, as well as generally over the nation, make a definite distinction between penalizing parties who offend against laws relating to marriage on the one hand, and the validity of such marriages on the other hand. The general rule of law followed by the Missouri courts is that a ceremonial marriage is not void unless the statute prohibits such a marriage. There are several classes of marriages which are by the statute prohibited. Bigamous marriages and common-law marriages are illustrations thereof.

However, the marriages under the circumstances considered in this opinion are not those which are prohibited by law. The statute does not say that the marriage itself shall be void if the marriage ceremony is not performed within ten days after the issuance of the license. It merely provides that the license shall be void. The courts in this state have held that a marriage itself is valid although no legal license was procured.

In *State v. Eden*, 169 S.W. (2d) 342 (1943), Division No. 2 of our Supreme Court affirmed a conviction of bigamy. The facts were that defendant had in 1939 procured from a justice of the peace a marriage license to marry Edith Box. In July, 1941, the defendant procured from another justice of the peace a marriage license to marry Letta Pancake. Neither license was issued by the recorder of deeds, as required by law. In both instances the defendant "went through the form of the two ceremonial marriages in question." After procurement of each said so-called license, living together and cohabitation followed and a child was born to the first union, and the second wife became pregnant. Thereafter defendant was prosecuted for bigamy and his defense was that the second marriage was not bigamous, because he was never legally married to the first wife who was still living. The court held the first marriage was not void but, at most, voidable (on which question of voidability the court did not pass) and not having been legally voided was a marriage, and that our statute saying "no marriage shall be recognized as

valid," etc., means nothing more than "it shall not be recognized as valid on judgment, and certainly not that it is ipso facto and utterly void." The court said at l.c. 344-5:

"Section 3364 says 'no marriage hereafter contracted shall be recognized as valid unless a license for that purpose shall have been previously obtained from the officer authorized to issue the same. The same section further provides, 'Common-law marriages hereafter contracted shall be null and void.' These provisions were enacted by the 51st General Assembly, Laws 1921, p. 468, by an amendment which added all of the matter now contained in said section following the second comma therein. It is clear said amendment was designed to prohibit nonceremonial or common-law marriages, which until that time were sanctioned, notwithstanding the statute which then read, 'Previous to any marriage in this state, a license for that purpose shall be obtained.' Sec. 7302, R.S. 1919. This is made manifest by the express words of the statute declaring all such marriages thereafter contracted to be 'null and void.' But the section itself contains an exception -- that with relation to the want of authority in any person solemnizing a marriage 'under the next preceding section, if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage.' But the 'want of authority' therein specified has no reference to the matter of a license. It is not contended there was any invalidity in the first marriage other than as declared by Sec. 3364, and so we are not concerned with other sections which declare certain marriages 'absolutely void,' such as those between uncles and nieces, aunts and nephews, first cousins, etc., Mo. R.S.A. Sec. 3361; nor, for the moment, with Sec. 3362 making like provision as to 'all marriages, where either of the parties has a former wife or

husband living, * * * unless the former marriage shall have been dissolved.' As we construe the language of Sec. 3364, 'no marriage hereafter contracted shall be recognized as valid,' etc., it was not intended to render void ab initio a ceremonial marriage solemnized under the forms of, and in apparent compliance with, the marriage statutes, as in the case at bar. As to such marriage (even assuming the truth of defendant's testimony touching the circumstances under which he procured the license), it is our conclusion the language just quoted, when taken in connection with the further provision that 'no marriage shall be deemed or adjudged invalid' (for the reason therein specified) can, in no event, mean anything more than it shall not be recognized as valid on judgment, and certainly not that it is ipso facto and utterly void. In other words, the most that can be said of the defective issuance of the license, if such it was, is that it rendered the marriage merely voidable, and it was therefore to be treated as valid until declared void by competent authority; and a voidable marriage will support an indictment for bigamy. 10 C.J.S., Bigamy, Sec. 4; 7 Am. Jur., Bigamy, Sec. 9. We express no opinion as to whether, on the facts assumed, the defect was so gross as to have justified a decree of nullity in a proceeding brought for that purpose. It is enough to say it had not been so declared, and thus brought within the exception created by the fourth clause of Sec. 4645, supra.
* * * "

In addition to the above reasons why such marriage is not void, Section 3364-C, Laws 1943, page 642, specifically provides that if the contracting parties are otherwise qualified for marriage the validity of the marriage shall not be impaired by any violation of the provisions of Section 3364-A, supra.

Conclusion.

It is our opinion that a marriage is not rendered void

Mr. Alfred F. Nooller

-5-

because of the fact that the marriage ceremony is performed more than ten days after the date of the issuance of the license therefor.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

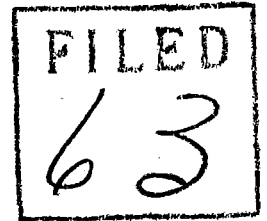
J. W. TAYLOR
Attorney General

DW:ml

SHERIFFS:
NEPOTISM:

The employment by a sheriff in a county of the third class of his wife to cook the meals for prisoners, for which the sheriff is reimbursed, violates Sec. 6, Art. VII, Constitution of Missouri.

November 19, 1946



Honorable M. E. Montgomery
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

We acknowledge receipt of your request for an official opinion of this department, reading as follows:

"The County Court of Scott County, Missouri requests your opinion in the following matter:

"In accordance with Sec. 4 of the legislative Act providing for the salary and compensation of Sheriffs of Counties of the third class, the Sheriff of this County submits his statement to the County Court on the last day of each month showing the actual cost of feeding persons under his custody in jail. On this statement he includes the item of 'Cook' \$100.00, for the person who does the cooking. It happens that the Sheriff, instead of employing domestic help outside of his family, uses his wife in that respect, and pays her \$100.00 per month, to cook for the prisoners.

"Is it all right for the County Court to reimburse the Sheriff for this expense item?

"Would such employment of the Sheriff's wife, by the Sheriff, as domestic help be contrary to the anti-nepotism law in effect?"

Section 4 of House Bill No. 899 of the 63rd General Assembly provides as follows:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his

custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

The "actual cost" of furnishing prisoners with wholesome food includes the cost of the food itself and the cost of having the food cooked, if the sheriff adopts this method of feeding the prisoners. He can, of course, purchase meals already cooked from someone and serve them to the prisoners.

In the case of Doty v. Sauk County, 93 Wis. 102, l.c. 103, the Supreme Court of Wisconsin said:

" * * * This court has repeatedly held that the county is liable to the sheriff for whatever the proper board of persons confined in the county jail may actually cost, including the cost of the materials used for food and for preparing and serving the same, but without any allowance for the sheriff's personal services or for profits in his favor. * * *"

The sheriff, therefore, is entitled to reimbursement for money he has expended in having food cooked for prisoners when he buys the food himself and has it cooked himself.

The question as to whether or not the sheriff of a third class county is entitled to reimbursement for payments he makes to his wife for cooking food for prisoners depends on whether or not such employment comes within the provisions of Section 6, Article VII, of the Constitution of Missouri. Said Section 6 of Article VII reads as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The sheriff names or appoints the cook in this case, not as an individual, but his authority for such naming or appointing is derived from the fact that he occupies the office of sheriff. It follows, then, that the sheriff names or appoints the cook "by virtue of his office."

It becomes necessary, then, for us to determine whether or not the cook employed by the sheriff in a county of the third class for the purpose of cooking meals for prisoners has been named to "public employment." The nepotism section of the Constitution covers the naming or appointing of those within the prohibited degrees of relationship both to public office and employment. Definitions of the word "public" as applied to "public officers" are applicable to a definition of the word "public" as applied to an employee. In 46 C. J., 921, par. 1, the law is thus declared:

"Offices have been classed as public or private in accordance with the nature of the duty or trust involved, every office being public, the duties of which concern the public. * * *"

See, also, State v. Spaulding, 102 Iowa 639, 72 N.W. 288, where the court declares (N.W. 289):

" * * * Every man is a public officer who hath any duty concerning the public and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and nature of that duty which makes him a public officer, and not the extent of his authority. * * *"

In People v. Hayes, 7 How. Pr. (N.Y.) 248, the court approvingly quotes Best, Ch. J., in Henly v. Mayor of Lyme (5 Bing. 91):

"In my opinion every one who is appointed to discharge a public duty, and received compensation, in whatever shape, whether from the crown or otherwise, is a public officer."

Section 1 of House Bill No. 899 of the 63rd General Assembly provides that the sheriff shall be compensated by salary for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense.

In the present case, the payments made to the sheriff as reimbursement for his expenses for furnishing food to prisoners are paid by the county and are, therefore, paid out of public funds. The wife, in this case, is not paid out of compensation received by the sheriff, but is paid out of money paid to the sheriff to reimburse him for the actual expense. Therefore, the wife is not an employee of the husband, but is a public employee, as she is engaged in the performance of duties which are enjoined upon

the sheriff by law.

It is clear that the feeding of prisoners and the procuring of food for prisoners constitute part of the official duties of the sheriff. The fact that the sheriff, and not the county, is directly liable to the cook for payment for cooking such food does not prevent such cook from being a public employee.

The Supreme Court of Missouri, in the case of State ex inf. McKittrick v. Bode, 342 Mo. 162, 1.c. 166, said:

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualifications they "shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff." (R.S. 1889, secs. 8181 and 8182.)

* * * * *

"It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the State, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be "a public charge or employment." (U.S. v. Maurice, 2 Brock, 96.) * * *"
(Emphasis ours.)

The Springfield Court of Appeals, in the case of Scott and Morrison v. Endicott, 225 Mo. App. 426, 1.c. 427-428, said:

"There can be no doubt that a deputy sheriff appointed by the sheriff, as provided by section 11512, Revised Statutes 1929, is a public officer. (State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636.) That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark county. It is perhaps common practice in some counties for the sheriff to pay his deputies a specified amount,

but we are not herein concerned with the legality of such contracts. * * *

Since it is held by the courts that every public office is a public employment, the reasoning in the above cases leads us to the conclusion that a person need not be compensated directly by a county in order to be a public employee. The naming or appointing by the sheriff of his wife as the cook to prepare meals for prisoners in counties of the third class, then, is a violation of Section 6, Article VII, of the Constitution, since she is paid out of public funds for performing official duties which are by statute enjoined on the sheriff.

CONCLUSION

It is, therefore, the opinion of this department that the county court should not reimburse the sheriff in counties of the third class for moneys paid by said sheriff to his wife as a cook in preparing meals for prisoners.

It is further the opinion of this department that the naming or appointing by the sheriff of his wife as cook violates Section 6, Article VII, of the Constitution of Missouri.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

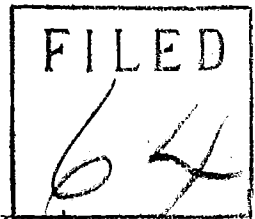
CBB:HR

BANKING CORPORATIONS: restoration : Under the order of the Commissioner of Finance
of impaired capital. : for a banking corporation to restore impaired
: capital, the directors of such corporation may
: personally sign a guaranty or place property
: in escrow with a contract that such property
: may be held by the Commissioner of Finance, or
: other person designated, until the capital
: impairment of such corporation is restored

February 9, 1946 from normal earnings or if need
be, to sell such assets and apply
the proceeds to such repairment.
Such contract should be definite
respecting the rights of all par-
ties as to the holding, sale or
withdrawal of such property.

2-14

Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri



Dear Mr. Morris:

We have your letter requesting an opinion respect-
ing the right and the binding effect, in case of the im-
pairment of the capital funds of a bank, of the Directors
of a bank to restore the impaired capital stock to person-
ally sign a guaranty, or place cash and United States Gov-
ernment Bonds, belonging to them personally in escrow, with
a contract providing that such guaranty, or cash and bonds,
as the case may be, shall be held until such time as the
capital impairment is restored from normal earnings. Your
letter requesting the opinion is as follows:

"Under authority of Section 7904, R.S. Mo.
1939, I recently issued an order directing
that the capital stock of a corporation,
which in my opinion has an impairment, be
restored by a certain date.

"The Directors of this corporation have of-
fered to personally sign a guaranty or place
cash and United States government bonds, be-
longing to them personally, in escrow with a
contract that they shall be held until such
time that the capital impairment is restored
from normal earnings. Should the bank fail,
these securities or cash would be forfeited
and used in paying the deposit liability of
the bank. They suggest that they are willing
to enter into any type of contract which we
prepare in this connection.

"Please advise if there is any legal authority
for such procedure and oblige."

We observe by your letter that you have made your de-
partmental order for the bank in question whose capital has

February 9, 1946

become impaired, to restore the impaired capital stock within a time specified in your order, under Section 7904, Article 1, Chapter 39, R.S. Mo. 1939. Paragraph (1) of said Section 7904, giving you this power is as follows:

"(1) Whenever the commissioner shall have reason to believe that the capital stock of any corporation subject to the provisions of this chapter is reduced by impairment or otherwise, below the amount required by law, or by its certificates or articles of association, he shall issue an order that such corporation make good the deficiency forthwith or within a time specified in such order."

Section 7906, Article 1, Chapter 39, R.S. Mo. 1939, points out the procedure for Directors of a bank to follow in restoring impaired capital stock of a bank by issuing and selling capital notes. That method of restoring impaired capital stock of the bank in question is not involved here but it is not exclusive. Neither said Section 7906, nor any other Section of said Article and Chapter prohibits or in anywise abridges the right of Directors, stockholders, or officers of a bank to make donations, contracts, or the pledging of property to said bank, the use of any other lawful method to fully accomplish the restoration of the capital stock or capital funds of a bank where such capital stock has become impaired.

The duty resting upon the stockholders to keep the capital stock of a bank unimpaired is treated in C.J.S., Volume 9, Section 60, page 91, under "Banks and Banking". Said Section, in part, is as follows:

"The capital stock of a bank is a trust fund for the benefit of depositors and creditors and must be kept unimpaired, and the duty of making good on impairment rests on the stockholders. When the supervising officer of banks finds an impairment of capital of a banking institution, he may direct that the impairment be restored or made good within a certain time as a condition for continuance in business, and he may make an agreement with the officers of the bank whereby securities are pledged with him to secure the impairment; * * * ".

February 9, 1946

The same work, 9 C.J.S., pages 92 and 93, on this subject states this further text:

"Property conveyed by a stockholder to a bank to improve its assets is conveyed for a consideration, and becomes an asset of the bank.

"Where the directors of a bank, in response to a demand of the state bank examiner that they make good an impairment of the capital stock, sign and discount their personal note and deposit the proceeds to the credit of the bank, the transaction is a donation or gift to the bank.

The St. Louis Court of Appeals in this State considered in the case of Farmers & Merchants Bank of Eureka vs. Boland, the question of the liability of a person who had executed and delivered to the bank his promissory note for the purpose of providing for the restoration of impaired capital funds of the bank. The case is reported in 175 S. W. (2d) 939. The facts briefly stated were that Boland, a director in the bank, along with the other directors, provided funds for the restoration of the impaired capital funds of the bank. Boland gave his note to the bank for \$1000 for a loan of that amount in cash. The directors of the bank approved his loan. The proceeds of the note in cash were deposited to Mr. Boland's account. There it remained undisturbed until it was used some time later for the repairment of the impaired funds of the bank. The original impairment of the surplus and funds of the bank was a depreciation in its bond account. Later, the bond account was revived and restored by the reestablishment and appreciation of the bonds that had formerly been depreciated, and Mr. Boland received his \$1000 back from that source in 1935 or 1936. Mr. Boland from time to time renewed the note by giving a new note, and for a time paid the accumulated interest on each note. Later, he failed and refused to execute a new note upon the expiration of the due date period of the immediate former one and refused to pay the interest. The bank after demand, sued Boland upon the note. The bank recovered in the lower court. Boland appealed to the St. Louis Court of Appeals.

The defense of Mr. Boland was that at the time the suit was filed for some time before the impaired capital funds of the bank had been restored in the regular course of its business transactions, and that there was no consideration for the note, and that the note was not a gift to the bank, and that because

February 9, 1946

of the conditions under which the note was given, he had the right to withdraw the note without paying the same.

The St. Louis Court of Appeals in affirming the judgment of the lower court in favor of the bank and against Boland, and holding that money advanced by members of a Board of Directors in order to restore the capital or surplus of the bank was a gift to the bank, and could not be withdrawn even after the capital and surplus of the bank had been restored, unless and until the Commissioner of Finance gave his consent for such withdrawal where an agreement specified that the Commissioner of Finance must give his consent for the withdrawal -- and in the Boland case he had not done so -- the St. Louis Court of Appeals, l.c. 946, 947, said:

"Under Sections 7904 and 7910, R.S. Mo. 1939; Mo. R.S.A. Secs. 7904 and 7910, the state's Commissioner of Finance has very broad powers which he, in his discretion, may exercise for the protection of banks and for the safety and security of their depositors and creditors. He has power to require a bank's directors to do many things to safeguard a bank's funds and, under certain circumstances set forth in the statutes, supra, to close a bank and to take possession of its assets.

* * * * *

"We are of the opinion that defendant failed to sustain his affirmative defense to the note sued on and was not entitled to have it canceled or to be relieved of payment thereof. * * *".

The above case furnishes ample authority for the exercise of the broad powers given the Commissioner of Finance under the statute. The Courts of other States have held to the same ruling as our Court of Appeals in the Boland case. Such authorities are cited in the footnotes to the above quoted authority of C.J.S., and may be readily available for further research upon the question by those interested. They are not further noted here because the decision of our own Court above quoted is sufficient, we think.

We believe, however, that if such a contract as mentioned in the letter of the Commissioner of Finance be entered into as a guaranty, or pledging property or for the placing of cash or bonds or other property in escrow for the purpose of restoring impaired capital stock, funds or surplus of a bank, it should be definite and positive in providing that the bank or other proper person, the Commissioner of Finance if he be agreed upon, have the absolute right to hold such assets for a definite time until the capital stock, funds or surplus of the bank be restored from normal earnings, or that if, at any time during the existence of such impairment, it may become necessary or expedient to use such pledged cash or securities, or other property, provided for the purpose, that the same be held to be a gift to the bank, and that the same may be sold and the proceeds thereof, or the cash, if such pledged assets be in cash, be applied to the restoration of such impaired capital stock, and that the conditions under which the Directors, stockholders or officers of the bank may with draw such assets be set forth in plain, definite, language so that there may be no controversy about the matter.

Our Supreme Court considered a case somewhat of the nature of the question here being considered in the case of State ex rel. Gordon vs. Trimble et al. 318 Mo. 341. The Supreme Court held in the Gordon case that it was not every payment of assessments or pledged assets by directors or stockholders of a bank to restore the impaired capital stock or funds of a bank that became a gift to the bank. The Court held that whether such pledged assets became a gift or were a loan, and should be repaid by the bank to the persons providing the same, should be stated definitely in the agreement providing for the assessment or pledging of assets to relieve a bank of financial difficulties. The Court, l.c. 346, 347, on the point, said:

"The cases cited by respondents undoubtedly support the general proposition that 'where stockholders voluntarily assessed themselves to relieve the corporation from pecuniary embarrassment; or for the betterment of their stock, such advancements are not debts, but assets of the corporation.' But it does not follow that every payment of money to a financially embarrassed corporation by one or all of its stockholders or directors is paid to it without any agreement for its repayment or that a stockholder cannot make a payment under such an agreement which may be recovered.

* * * * *

February 9, 1946

"Even if the payments of assessments by stockholders and directors to a corporation to relieve its financial embarrassment, without the showing of an agreement to the contrary, must be regarded as assets of the corporation and not as debts, it does not follow that such payments may not be made under a valid and binding agreement that they are to constitute debts of the corporation which should be repaid. * * * "

The Supreme Court held in the Gordon case that the director and president of a bank was entitled to withdraw the funds he had provided for the restoration of the impaired capital funds of the bank on the ground that the contract and agreement made when the funds were provided for did not specifically state that he was not entitled to withdraw them, and did not state definitely that they were a gift to the bank there being evidence of a verbal understanding that he was to be repaid. Following that decision we think as stated above that this should be definitely stated in the agreement and contract providing for such pledging of property.

It is a familiar rule of the common law that any person has the right to engage in any business, undertaking or contract which is not evil or unlawful in itself, unless of course, such acts are prohibited by statute. We believe that any person interested in a bank as a stockholder, director, or officer would have the right under the above cited authorities to enter into such a contract as is mentioned in your letter, or to pledge securities or assets of any kind including cash, or Government bonds, to restore the impaired capital stock of a bank.

CONCLUSION.

It is, therefore, the opinion of this Department that directors or stockholders of the banking institution referred to in your letter may lawfully, personally sign a guaranty, or pledge cash or United States Government bonds to a bank, and place them in escrow to be held by the Commissioner of Finance or the bank, or any person or corporation named in a contract provided that it may be held until such time as the

February 9, 1946

capital impairment is restored, or be sold if necessary to restore such impairment. Such a contract would be lawful under the above cited authorities. Such a contract, however, should be definite and certain as to the rights of all the parties concerned respecting the holding, sale or withdrawal of such pledged assets.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

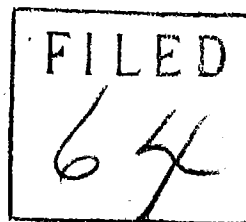
J. E. TAYLOR
Attorney General

GWC:ir

BANKS -Liability of endorsement
under Section 7952, Laws of Missouri,
1943, page 995.

: A bank and an endorser may not
: by contract fix or limit the
: liability of an endorsement
: contrary to the terms of Sec-
: tion 7952, Laws of Missouri, 1943.

March 28, 1946



Honorable M. E. Morris
Commissioner of Finance
State of Missouri
Jefferson City, Missouri

Dear Commissioner Morris:

Your letter, requesting the opinion of this Department, respecting the endorsement of liability in excess of the provisions of Section 7952, Laws of Missouri, 1943, page 995, has been received.

Your letter states the following:

"Re: Sec. 7952, R.S. Mo. 1939, as amended, Laws Missouri, 1943.

"A partnership has an endorsed liability in a bank aggregating \$86,886.72, on which the partnership endorses by straight endorsement. The amount involved is excessive under the statute referred to. The legal limit to one individual or partnership in the bank involved is \$40,000.

"In order to avoid the excessive feature of the law, the bank and the endorser have entered into a contract which, in substance, is as follows:

"It is hereby agreed that the total liability under endorsement on notes sold to the bank shall be limited to \$20,000 at any one time, regardless of the total of such notes, and the bank reserves the right to allocate the liability to such notes as it may deem proper."

"This agreement is signed by the bank and the borrower. We understand that this procedure was recommended by the city correspondent but this Department

March 28, 1946

has taken the position that the contract is not valid, and that the endorsement with recourse on a negotiable instrument could not be limited in this manner.

"We will appreciate your opinion in this connection as speedily as possible, and will be glad to furnish any further information which is necessary in connection with this situation."

It is not indicated in your letter what the capitalization is of the bank interested in this transaction. Neither, is it stated what the population of the city is in which the bank is located. However, your letter does state that the legal limit to one individual or partnership in the bank involved is \$40,000. You state that the endorsed liability of this partnership to the bank involved is actually \$86,886.72.

The quoted agreement as a part of the contract between the bank and the endorser as you give it, and which is quoted in your letter, is, we think, wholly inadequate and powerless to avoid or abridge the terms of said Section 7952. Such a contract, undertaking to fix the liability of the endorser according to the judgment and assumed right of the bank to allocate the liability to such notes as the bank may deem proper, has no foundation in said Section 7952, or elsewhere, in the banking code of this State. The statute fixes the liability of an individual, a co-partnership, corporation, or body politic as to the percentage of the capitalization of a bank which may become a loan by endorsement, discount or otherwise. We do not think it within the power, privilege or right of the partnership or the bank, or both of them, in the present case to effect a valid transaction in violation of the statute.

We believe your Department has taken the correct position that the contract is not valid, and that the endorsement with recourse on a negotiable instrument could not be limited by a contract between the endorser and the bank in plain violation of said Section 7952.

CONCLUSION

It is, the opinion of this Department that, under the statement of facts indicated in your letter, the contract

Honorable M. E. Morris

-3-

March 28, 1946

made between the bank and the endorser is invalid, and in violation of said Section 7952, and that the endorsement with recourse on a negotiable instrument cannot be limited in liability in such manner, but on the contrary, the liability of the endorser is fixed and determined by the terms of said Section 7952.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

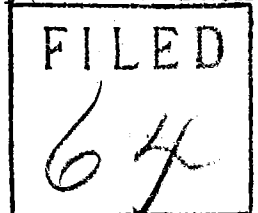
GWC:ir

BANKS - Restrictions on Loans: Under sub-section (e) of Section 7952, Laws of Missouri, 1943, page 995, such drafts or bills of exchange therein named are not exempted from the restrictions of sub-section 1 of said Section 7952, where such drafts are not drawn against "actually existing values" as contemplated by said sub-section (e) of said Section 7952. The drawing of such drafts due 30, 60 and 90 days from date would constitute a loan liability of the individual, partnership, corporation or body politic borrowing money from a bank and must be computed as such.

March 29, 1946

Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

4-9



Dear Commissioner Morris:

Your letter requesting an opinion with respect to the amount of money that may be loaned by a bank as a per centum of the capital stock of said bank, under the terms of Section 7952, Laws of Missouri, 1943, page 995, has been received.

Your letter containing pertinent features of your correspondence with Mr. Walker MacMillan, Vice-President of the Jefferson Bank and Trust Company of St. Louis, Missouri, regarding the subject matter to be considered, is as follows:

"Honorable J. E. Taylor
Attorney General
Supreme Court Building
Jefferson City, Missouri

"Dear General Taylor:

"On November 10th we received the following letter from the Jefferson Bank and Trust Company, St. Louis, Missouri:

"Mr. M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

"Dear Mr. Morris:

"Reference is made to Section 7952, Banking Laws of State of Missouri - 1939.

"Restrictions on loans, purchase of securities and total liabilities to banks of any one person."

March 29, 1946

"In our particular case, we have a paid in capital and surplus fund of \$300,000 and are located in a city having a population of over one hundred thousand.

"We interpret the provisions of Section 7952 to permit, among other things

"1) Our lending to a private corporation \$75,000 "upon commercial or business paper actually owned by the person negotiating the same and are endorsed by such person without limitation" or "are secured by collateral security having an ascertained market value of at least fifteen per centum more than the amount of the liabilities so secured."

"2) In computing total liabilities, the law provides that "The purchase or discount of drafts, or bills of exchange drawn in good faith against actually existing values, shall not be considered as money borrowed" and therefore such transactions need not be considered under the restrictions limiting the total liability of any one person.

"We further interpret drafts or bills of exchange to include Sight Drafts payable on presentation and/or Trade Acceptances payable in the normal course of self liquidation, thirty, sixty or ninety days from date. The transactions which give rise to the Trade Acceptances are the purchase of goods in car load lots to cover the buyers normal requirements over the current contractual period. Shipments are made against shippers order bills-of-lading and drafts are drawn for the full amount of the shipment, payable one-third or one-quarter at sight and the balance divided equally over

March 29, 1946

the next thirty, sixty or ninety days, according to the basis of consumption. The drawer takes immediate credit at the bank and upon payment of the sight-draft and acceptance of the other drafts with fixed maturities, the bill-of-lading is released and the Trade Acceptances are then carried as an asset in loan account until maturity with recourse on the shipper.

"We have such a situation pending and will therefore appreciate a response from your office as quickly as possible and particularly as it relates to our interpretation of paragraph 2).

"Yours very truly

WALKER MacMILLAN /s/

"Walker MacMillan
Vice President."

"Below we quote from our answer to this letter:

"It is the opinion of this Department that time drafts, viz. those payable in 30, 60 or 90 days from date, are not included in the exemptions provided for in the paragraph referred to in your letter. We believe that such drafts, or trade acceptances, would necessarily be computed as a liability of the corporation involved."

"Mr. MacMillan does not agree with our conclusions and under date of November 15th writes as follows:

"Thank you for your letter of November 13th replying to ours of the 9th on the subject of total liability of any one person.

"Your interpretation of the acceptance drafts is not unlike the construction of one of my associate officers, however, I personally feel that the acceptance

March 29, 1946

drafts fall within the exemption of paragraph (e) Section 7952 of the State law.

"Certainly the drafts are drawn in good faith and against actually existing values as evidenced by the contract of the drawer and the payment by the buyer of one third or one quarter at sight and his acceptance of the balance payable in installments 30, 60 or 90 days from date.

"Whether the words "actually existing values" was intended to imply as at time of shipment or against goods which may go into a warehouse or be released to the buyer upon his acceptance of drafts to be paid according to his basis of consumption, seems to be a question although this appears to me to be clearly a self liquidating transaction, and for that reason the law purposely avoids stating any exemptions to the kind of draft just so long as it is drawn in good faith against actually existing values.

"It would be very interesting to have an opinion from the Attorney General's office, and if you will pass this along, we shall be grateful to you."

"At your convenience we would appreciate an opinion in this connection".

Section 7952, R.S. Mo. 1939, was repealed by the Laws of Missouri, 1941, page 679, and a new Section was enacted in lieu thereof.

The Act of 1941, was in turn repealed, Laws of Missouri, 1943, page 994, and a new Section known as Section 7952, was enacted in place thereof, and the last named statute is now the law of the State on the subject. However, sub-section (e), l.c. 997, remains the same in

March 29, 1946

the present amendment of 1943, as it was in both Laws of Missouri, 1941, page 679, l.c. 681, and Section 7952, R.S. Mo. 1939.

We think it proper to quote sub-section (e) of Section 7952, Laws of Missouri, 1943, l.c. 997 here, but in order that its relationship and proper office may be understood we will quote the first paragraph of said Section 7952, Laws of Missouri, 1943, l.c. 995, so that when quoted both of said sub-sections of Section 7952 will read as follows:

"Section 7952. Restrictions on loans, purchase of securities and total liability to banks of any one person. A Bank subject to the provisions of this article:

"1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letters or credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange or other obligations of such individual, partnership, corporation or body politic an amount or amounts in the aggregate which will exceed fifteen (15) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty (20) per centum of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of less than one hundred thousand and over seven thousand; and twenty-five (25) per centum of the capital stock actually paid in and surplus fund of such bank if located elsewhere in the state, with the following exceptions:

"(a) The restrictions in this subdivision shall not apply to,

* * * * *

"(e) The purchase or discount of drafts, or bills of exchange drawn in good faith against actually existing values, shall not be considered as money borrowed within the meaning of this section."

March 29, 1946

The question you submit is, whether the value of acceptance drafts as mentioned and defined in said sub-section (e), page 997, Laws of Missouri, 1943, are excepted from the value given evidences of debt mentioned and defined in sub-section 1 of said new Section 7952, as paper not constituting any part of the percentage value a bank may lend any one person, when, for instance, a sight draft is issued along with a shipper's order bill of lading, and the draft for the full value of the amount of the shipment. Your letter then states:

"The drawer takes immediate credit at the bank and upon payment of the sight-draft and acceptance of the other drafts with fixed maturities, the bill-of-lading is released and the Trade Acceptances are then carried as an asset in loan account until maturity with recourse on the shipper."

It would thus appear that the intention of the parties would be, under the transaction in question, to treat the matter as a loan so that in case the consignee or buyer should fail to pay the trade acceptances when becoming due the bank would charge such delinquencies back against the account of the shipper on the basis of a straight loan.

From the statement made by Mr. MacMillan it would appear that the sight draft and the acceptance drafts to be issued in the transaction contemplated are not drawn against "actually existing values", within the meaning of said Section 7952, supra, but are drawn against the credit of the buyer or consignee, and upon payment of the sight draft and acceptance of the 30, 60 and 90 day drafts the bills-of-lading are released to the purchaser, leaving the bank with no actually existing values back of the acceptance drafts.

Under such conditions as are indicated, that is, that the acceptance drafts are to be paid in 30, 60 and 90 days, the transaction would not be a self liquidating transaction as the bank would have no claim or lien against the goods in the hands of the buyer.

We believe you were acting strictly within your administrative power in your Department and in the proper interpretation of the statute when you wrote to Mr. MacMillan:

March 29, 1946

"It is the opinion of this Department that time drafts, viz. those payable in 30, 60 or 90 days from date, are not included in the exemptions provided for in the paragraph referred to in your letter. We believe that such drafts, or trade acceptances, would necessarily be computed as a liability of the corporation involved."

CONCLUSION.

It is, therefore, the opinion of this Department that the drafts mentioned and described in your letter concerning the proposed transaction would not be drawn against "actually existing values" as contemplated in sub-section (e) of said Section 7952, Laws of Missouri, 1943, page 997, and that such drafts or trade acceptances must be computed as a loan liability of the individual, partnership, corporation or body politic borrowing money from a bank, and that such drafts are not included in the exemptions provided for in sub-section (e) from the restrictions provided for in sub-section 1 of said Section 7952, Laws of Missouri, 1943, page 995.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

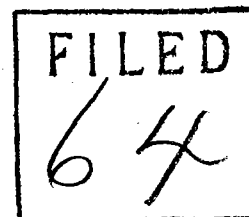
GWC:lr

BANKS-TRUST COS.-Loans under Sections: Banks or trust companies may not ac-
7952 or 8032, Laws of Mo., 1943 : cept assigned life insurance poli-
: cies as security for loans under
: Section 7952 or Section 8032, Laws of
: Mo. 1943, as security constituting
: "collateral security having an as-
: certained market value", and if so
: used by a bank or trust company to

May 24, 1946 : increase the loan ratio of the
: capitalization of any such bank
: or trust company above the per-
: centage set out in said Sections,
: such loan or loans would be ex-
: cessive.

Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

6/4



Dear Commissioner Morris:

This will acknowledge the receipt of your request for an opinion respecting the use of assigned life insurance policies as "collateral security having an ascertained market value" in obtaining loans from banks under Section 7952 and Section 8032, R.S. Mo. 1939, and amendments thereto.

Your letter is as follows:

"A controversy has arisen in connection with the construction placed on Section 8032, paragraph 4, subparagraph (b), and Section 7952, paragraph 4, subparagraph (b), Laws Missouri, 1941, for banks. The question is whether or not a loan secured by properly assigned life insurance policies with sufficient cash value to collateralize the loan would be considered as constituting 'collateral security having an ascertained market value.'

"Quoting from communication received in this connection and for your information,

"Your letter of the 15th draws the conclusion that the provisions include only loans to foreign nations, railroad corporations or corporations subject to the jurisdiction of a public service commission of this state and make no provision for cash value of life insurance. The foreign nations,

etc., is only the first phase of the rule and we agree in that it does not apply to the case at issue.

"The second phase which refers to loans to individuals, etc. governs in our particular case and provides for loans up to 25% of our capital and fixed surplus against assignments of cash value life insurance under the classification of "collateral security having an ascertained market value of at least 15% more than the amount of the liabilities so secured."

"The insurance policies which we hold are all issued by top rated companies and of course provide a specific loan and redemption value so there cannot be any question at any time as to the collateral security and the market value. In effect they are a guaranteed first lien obligation of the insurance companies.

"At the time of our last examination we had a capital and fixed surplus of \$375,000.00 which made our loan limit to any one name, under the terms of paragraph 4(b) \$93,750.00 of which 60% could be unsecured and 40% secured. Since examination date we have increased our capital and fixed surplus to \$400,000.00.

"The loan in question is only \$63,146.21 and the collateral value \$74,000.00 plus, or almost 120% collateralized.

"If we are wrong in our interpretation as to the latitude of the word "Collateral Security having an ascertained market value" then we might just as well disregard everything except the

15% rule as covered by paragraph 1 of Sec. 7952 because how are we going to determine a sounder valuation on any commodity, whether it be real estate, automobiles etc., food products, stocks, bonds or what have you.'

"Our Examiner has taken the position that the amount of the loan is excessive under the provisions of this Section and that this type of collateral does not come under the exceptions set out.

"We would appreciate your opinion very much."

Sections 7952 and 8032, as mentioned in your letter, and as contained in the Session Acts of Missouri, 1941, appeared under the same section numbers in the Revised Statutes of 1939.

Both sections were again amended in the Laws of Missouri of the legislative session in 1943.

Section 7952 relating to banks appeared in the Laws of Missouri, 1941, at page 680. This section appears in the Laws of Missouri, 1943, at page 994.

Said Section 8032 relates to trust companies. This section of the revision of 1939, appears in Laws of Missouri, 1941, at page 685. This section as later amended, Laws of Missouri, 1943, appears at page 988.

There is no appreciable difference, if any at all, in the language of the two sections appearing at the pages above designated in Laws of Missouri, 1943, from the language used in both of said sections in the revision of 1939, and the amendments of 1941.

Both of these sections, Section 7952 relating to banks, and Section 8032, relating to trust companies, constitute the present laws of this State in saying what banks and trust companies shall do and shall not do. The particular sections and subsections referred to in your

letter as to banks are subsection (4), paragraph (b) of Section 7952, l.c. 995, 996, Laws of Missouri, 1943, and as pertaining to trust companies, subsection (4), paragraph (b) of Section 8032, Laws of Missouri, 1943, l.c. 989, and undertake to, and do set out and safeguard the percentage of the capitalization of any such bank or trust company that may be loaned to any one individual, partnership, corporation or body politic, by means of the use of the different kinds of collateral therein mentioned to obtain such loan. Subsection 1 of Section 7952, Laws of Missouri, 1943, l.c. 995, and subsection 1 of Section 8032, Laws of Missouri, 1943, l.c. 988, dealing with banks and trust companies, respectively, set forth the restrictions to which the banks and trust companies are held in the percentage of their capitalization they may make on loans, and describe the kind of security upon which such restrictions are established as the basis of such loans.

Then follow the descriptions of the kinds of evidences of debt which are exceptions to the kinds of securities upon which such restrictions are fixed. Both sections (b) of said Section 7952, relating to banks, and of said Section 8032, relating to trust companies, appearing respectively, on page 996, Laws of Missouri, 1943, under "Banks", and Section 8032, page 989, Laws of Missouri, 1943, relating to "Trust Companies" are identical in every particular, except at the appropriate place in each of said sections they use the words "trust company" and "bank".

It will be noted that both of these paragraphs (b) of the subsections of Sections 7952 and 8032, Laws of Missouri, 1943, respectively, close with these significant words: "are secured by collateral security having an ascertained market value of at least fifteen (15) per centum more than the amount of the liabilities so secured." The collateral sought to be used and accepted under the loan mentioned in the correspondence that you quote from is assigned life insurance policies, having, it is said, sufficient cash value to "collateralize the loan", and, according to the understanding of the person who was the writer of your information would constitute "collateral security having an ascertained market value".

We do not find mentioned in any part of either Section 7952, relating to banks, or Section 8032, relating to trust companies, that life insurance policies may be

considered in the character of securities which are either included or exempted from the classes of securities named in said sections which may be considered as collateral security for loans.

It has long been the law of this State as declared by our statutes and by our courts that, life insurance policies may be assigned and used as collateral for a loan. This is the declared law of every State in the Union, we believe. Our statute 5862, Article 3, Chapter 37, R.S. Mo. 1939, recognizes the validity of such an assignment of an insurance policy where it is stated, in part: "Any assignment of a policy or certificate to a person having no insurable interest in the insured life shall render such assignments void and of no effect."

37 Corpus Juris, page 387, Section 52, in part, under the title of "Life Insurance" states the rule thus:

"The authorities are agreed that an assignment of a life insurance policy to a person possessing an insurable interest in the life of insured is valid. * * * ", citing Kelly vs. Prudential Ins. Co., 148 Mo. A. 249.

The opinion in Kelly vs. Prudential Ins. Co., supra, in sustaining the above rule, l.c. 258, states:

"The proposition contended for by counsel for respondent that a party cannot assign an insurance policy to one who is not a relative is untenable. It has been decided that he may assign to any one standing in the position of creditor or dependent; that is, to one who has an insurable interest in his life. * * * ".

The proposition of the validity of the assignment of a life insurance policy to a person, a bank, or any other assignee, as a creditor is not the particular question here. The evident conclusion of the bank in this case is that, it may make a loan in excess of the percentage ratio of the capitalization of the bank with assigned life insurance policies under both of said paragraphs (b) of subsections 4 of both, Sections 7952, Laws

of Missouri, 1943, page 996, relating to banks, and 8032, Laws of Missouri, 1943, page 989, relating to trust companies, and that life insurance policies may be used as security for loans as "collateral security having an ascertained market value of at least fifteen (15) per centum more than the amount of the liabilities so secured."

This, we think, may not be done.

One of the exceptions made in both of said Sections 7952 and 8032, to the restrictions in subsection 1 of each of said sections on the character of securities which may be made the basis of the percentage of the capitalization of a bank or trust company loan is contained in the last clause of said paragraph (b) of subsection 4 is, to again repeat, "collateral security having an ascertained market value of at least fifteen (15) per centum more than the amount of the liabilities so secured." This exemption, we think, could not possibly include life insurance policies so far as "market values" are defined and construed. They not only do not have an "ascertained market value", but they possess no "market value" at all.

It is well known, we think, that life insurance policies have a paid up value, a surrender value, an extended insurance value, an assignment value, and a convertible insurance value to the insured, his beneficiary or his assignee dealing directly with him, and to repeat again, an assignment value as collateral for a loan, but to say that life insurance policies have a "market value" is not supported in any case by either law or usage that we are able to discover. "Public policy forbids such practice."

There are certain elements defined by law writers which must be considered in making up the "market value" of property. This is well stated in 38 Corpus Juris, pages 1262 and 1263, Section 18 (b), as follows:

"Just what elements go to make up market value depend largely upon the facts and circumstances surrounding the particular case. There is no inflexible rule. 'Market value' implies the existence of a market, that is, a demand or want. It relates to buying and selling. Market values are created and controlled by the condition

of the market with reference to supply and demand. * * * ".

Our St. Louis Court of Appeals in the case of Wagoner Undertaking Company vs. Jones, Executor, 134 Mo. App. Rep. 101, l.c. 107, defined the market value of the subject of that law suit as follows:

"* * * and by their market value is meant the prices they commonly brought at the time. * * * ".

One of the best and most clearly stated definitions we are able to cite of "market value" is an excerpt on page 1265, 38 Corpus Juris under note 74 (b) from Sloan vs. Baird, 162 N.Y. 327, 330, 56 NE 752, which is as follows:

"(b) 'The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed.' Sloan v. Baird, 162 N.Y. 327, 330, 56 NE 752 * * * ".

Having in mind the text above quoted from Corpus Juris that one of the primary elements for the establishment of a "market value" of any commodity is that, there must be a "market" for such commodity, it would be, we think, quite contrary to the intention of the Legislature in enacting Sections 7952 and 8032, supra, that assigned life insurance policies should be considered as "collateral security having an ascertained market value".

If life insurance were to be considered as having a market value it would be to establish it as the subject of speculation, barter and trade, which would infringe upon the long established rule that life insurance may not be tainted with the elements of a wagering contract, because against public policy.

We believe your position is a proper one in your interpretation of the statute that the loan in question

would be an excessive one under either of said Sections 7952 or 8032, and that assigned life insurance policies are not to be considered under either of said Sections of our statutes as "collateral security having an ascertained market value" for the purposes of security for a loan.

CONCLUSION

It is, therefore, the opinion of this Department that, assigned life insurance policies may not be used as security for a loan under Sections 7952 and 8032, R.S. Mo. 1939, as amended Laws of Missouri, 1943, page 996, and page 988, respectively, for banks or trust companies, as constituting "collateral security having an ascertained market value", and that if so used to exceed the value of the percentage of the capital of any such bank or trust company permitted to be loaned under the terms of said sections that such loan would be excessive.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

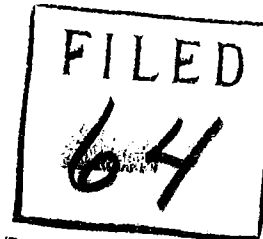
APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

TAXATION AND REVENUE: Liability for payment of Missouri intangible personal property tax on interest-bearing accounts receivable of foreign corporations doing business in this state.

July 22, 1946



Honorable M. E. Morris
Director of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, wherein you request an official opinion of this department based upon a letter received by you from the Associated Industries of Missouri. Their letter to you reads as follows:

"We have received several inquiries concerning the application of the tax on intangible personal property regarding property of persons not residing in the State of Missouri, and for the purpose of furnishing this information to our membership, many of whom handle business of non-residents, while others are themselves non-residents, we respectfully request your opinion assuming the facts as set forth below.

"Are accounts receivable, which bear interest, taxable in view of the third sentence in Section 1 (D) of Truly Agreed to and Finally Passed House Committee Substitute for House Bill 868, under the following facts:

"An out-of-state concern employs salesmen in Missouri, makes sales in Missouri, maintains a warehouse in Missouri from which deliveries are made, but does not maintain offices in the state. The principal offices are located outside of Missouri where the books and records are kept, including the accounts receivable growing out of Missouri sales. If it is your opinion that the income on such accounts receivable is not tax-

able, would it be otherwise if no offices or warehouses were maintained in the State of Missouri? Would the answer still be different if the accounts receivable themselves were kept within the state?

"We would appreciate receiving your reply at as early a date as practicable, inasmuch as many of our members need this information in connection with preparing their returns in the very near future."

That accounts receivable are included within the scope of intangible personal property subject to Missouri property tax appears in subsection (B) of Section 1 of House Bill No. 868 of the 63rd General Assembly, wherein we find the following statement:

"(B) Intangible personal property means * * * notes, debentures, annuities, accounts receivable; * * *"

The taxable situs of intangible personal property is fixed by the further provisions of subsection (D) of Section 1 of the same Act, which reads, in part, as follows:

"(D) The taxable situs of intangible personal property for the purpose of this act shall, for residents of Missouri, be the residence of the owner thereof. * * * All intangible property of persons residing in other states used in or arising out of business transacted in this state by, for or on behalf of such non-resident persons shall be taxed on the annual yield thereof, and the taxable situs shall be the location of the business. * * *"

It, therefore, becomes apparent that the answer to the inquiry made you will depend upon whether or not the taxable situs of the interest-bearing accounts receivable is within the taxing jurisdiction of the State of Missouri. The facts as submitted do not disclose whether or not such foreign "concern" is a foreign corporation licensed to do business in Missouri, or whether it is simply carrying on such business within this state. However, in view of certain statements made therein, we believe that your question is intended to relate to a corporation lawfully doing business in Missouri under a license to do so issued by the Corporation Department of the Office of the Secretary of State.

On the assumption that this is a correct statement of the situation, your attention is directed to a portion of Section 97 of the General Corporation Code of Missouri, found in Laws of 1943, pages 410 to 491, inclusive, which reads, in part, as follows:

" * * * A foreign corporation which shall have received a certificate of authority under this Act shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business; and, except as in this Act otherwise provided, shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a corporation of like character organized under or subject to this Act. * * * (Emphasis ours.)

That the intangible personal property of all domestic corporations is subject to the taxing provisions of House Bill No. 868 of the 63rd General Assembly appears from subsection (A) of Section 1 thereof, which reads, in part, as follows:

"(A) The term person includes any * * * corporation * * *."

While it is unquestionably true that the "residence" of a corporation remains the state under whose laws it has been created, yet such corporation may, by reason of its presence for the purpose of doing business in another state, acquire a constructive residence for certain purposes, particularly for the purpose of subjecting its property in such other state to the property tax laws thereof. We quote from *City of St. Louis v. Consolidated Coal Co.*, 113 Mo. 83, 1. c. 87, as follows:

" * * * While a corporation, in the jurisprudence of the United States, is regarded as a citizen of the state which created it and can exercise its franchise in another jurisdiction only so far as may be permitted, yet 'by the consent, express or implied, of

the local government, it may transact there any business not ultra vires, "and like a natural person may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction." St. Louis v. Ferry Co., 11 Wall. 424.

"If the physical situs of the boats was in St. Louis, they were taxable property there, though the legal residence of their owner was in Illinois. * * *"

Also, from City of St. Louis v. Wiggins Ferry Co., 78 U.S. 423, 11 Wall 42, 20 L. Ed. 192, mentioned in the above citation:

"In the jurisprudence of the United States a corporation is regarded as in effect a citizen of the state which created it. It has no faculty to emigrate. It can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not ultra vires, and, 'like a natural person, may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction.' Glaize v. S. C. R. Co. 1 Strob. 72; Cromwell v. Charleston Ins. Co. 2 Rich. 512. It is for the local sovereign to prescribe the terms and conditions upon which its presence by its agents and the conducting of its affairs shall be permitted. Bank v. Earle, 13 Pet. 588; Lafayette Ins. Co. v. French, 18 How. 405, 15 L. ed. 451.

"It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. *The authority extends over all persons and property within the sphere of its

territorial jurisdiction.* When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-making power and the operation of those conservative principles which lie at the foundation of all free government. McCulloch v. Md. 4 Wheat. 428; Prov. Bank v. Billings, 4 Pet. 563.

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultravires and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

"In the eye of the law personal property, for most purposes, has no locality. Mobilia sequuntur personam; immobilia situm. Mobilia nonhabent sequelam. In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situated, governs its disposal, and fixes the rights and shares of the several distributees. Story, Confl. L. sec. 379; Broom, Max. 501, 502; Re Ewin, 1 Cromp. & J. 156. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists. *Such property is, undoubtedly, liable to taxation there in all respects as if the proprietor were a resident of the same locality.* Int. Life Assur. Co. v. Comrs. of Taxes, 28 Barb. 318; People v. Comrs. 23 N. Y. 228; Story, Confl. L. 550. The personal property of a resident, at the place of his residence, is liable to taxation, although he has no intention to become domiciled there. Findley v. Phila. 32 Pa. 381. * * *" (Emphasis between ** ours.)

In view of the principles enunciated in the fourth paragraph of the last quoted citation, it becomes apparent that it is immaterial as to where the physical evidence of such intangible personal property is located. If the foreign corporation has in fact acquired such a residence for tax purposes in Missouri as to be subjected to the taxing jurisdiction of this state, then the situs of the accounts receivable arising from its business transactions in this state will remain here without regard to their physical location.

CONCLUSION

In the premises, we are of the opinion that interest upon accounts receivable which result from business transacted in the State of Missouri by a foreign corporation has a tax situs in Missouri, and therefore is subject to taxation under the Missouri intangible personal property tax laws.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

BOARD OF FUND COMMISSIONERS: Authority to impose charge for re-
registration of Series J State of
Missouri Road Bonds.

FILED

64

July 25, 1946

8-2

Hon. M. E. Morris, Secretary
Board of Fund Commissioners
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, re-
questing an official opinion of this office, and reading as
follows:

"The State Treasurer is in receipt of the
following described securities from the
Mercantile-Commerce Bank and Trust Company,
St. Louis, Missouri:

\$80,000 State of Missouri Road Bond
Series J, 4-1/4%, due 6-1-47
Nos. 43, 44, 46, 47, 48, 49,
52, 53 in the amount of \$10,000
each, registered in the name of
Title Insurance & Trust Company,
Corporation, 433 South Spring
Street, Los Angeles, Calif.

\$20,000 State of Missouri Road Bond Series
J, 4-1/4%, due 6-1-47 Nos. 32 and
33, in the amount of \$10,000 each,
registered in the name of Lucy
Smith Battson, Guardian for Timothy
Michael Doheny, a Minor, 714 West
10th Street, Los Angeles, Calif.

"The above described Bonds and Documents were
presented to the Board of Fund Commissioners
at a special meeting of the Board held on the
9th day of July, 1946, whereupon the Secre-
tary of the Board was instructed to inform the

Mercantile-Commerce Bank and Trust Company of St. Louis that there would be a charge of \$1.00 per thousand to re-issue and re-register the above described Bonds.

"The Mercantile-Commerce Bank and Trust Company objected to the charge and cited a clause in a resolution passed by the Board of Fund Commissioners on May 9, 1927, which clause is in words and figures as follows:

\$5,000,000
STATE OF MISSOURI
4-1/4% ROAD BONDS
SERIES J

"These Bonds are coupon bonds, in the denomination of One Thousand Dollars (\$1,000), registerable as to principal, or as to principal and interest, and are exchangeable for fully registered bonds in the denomination of Five Thousand (\$5,000), Ten Thousand Dollars (\$10,000), Fifty Thousand Dollars (\$50,000), and One Hundred Thousand Dollars (\$100,000) which fully registered bonds may again be exchanged for coupon bonds in the denomination of One Thousand Dollars (\$1,000) on payment of One Dollar (\$1.00) per thousand."

"The Board of Fund Commissioners, upon request from the holder, registers the original bonds of \$1,000 each without charge and also exchanges original \$1,000 Bonds into Bonds of denominations of \$5,000, \$10,000, \$50,000 and \$100,000 without additional charge, however, there is a charge of \$1.00 per thousand to re-convert registered bonds to bearer coupon bonds."

"The question I wish to submit to you is:

'Does the Board of Fund Commissioners have authority to make a charge of \$1.00 per thousand dollars to re-issue and re-register large denomination fully registered bonds?'"

The Series J State of Missouri Road Bonds, referred to in your letter of inquiry, were issued by the Board of Fund Commissioners as a part of the authorization conferred on such Board

by an Act of the General Assembly of Missouri found in Laws of Missouri, 1921, Extra Session, pages 126 to 131, inclusive, and Acts amendatory thereof. The various statutory enactments mentioned provide the scheme for the issuance of the bonds authorized by the adoption of Section 44a, Article IV, of the Constitution of 1875.

Section 2 of the Act found in Laws of Missouri, 1921, Extra Session, page 127, contains the statutory delegation of authority to the Board of Fund Commissioners with respect to its power to promulgate rules and regulations relative to the issuance, registration, conversion and transfer of title to such bonds. The said section reads, in part, as follows:

"As evidence of the indebtedness herein authorized there shall be issued from time to time, as occasion may require, negotiable gold coupon bonds of the state of Missouri, payable to bearer. * * * All bonds issued under and by virtue of this act, shall be in such form as may be prescribed by the board of fund commissioners, * * * The board shall, by resolution, provide a method for registering any of said bonds as the title thereto may be transferred, and for paying the interest thereon as it falls due, and the said board shall exchange registered bonds or bonds payable to bearer whenever requested by the holders thereof. * * *"

In considering the action taken by the Board of Fund Commissioners pursuant to the statutory grant of authority, we must, of course, give due regard to the general rule applicable to the acts of such administrative bodies. We quote from 59 C. J., page 112:

"Powers granted to state administrative agencies must be exercised in a just and reasonable manner, and in conformity with the statutory or constitutional source of the power conferred."

Referring to the Minutes of the Meeting of the Board of Fund Commissioners of the State of Missouri held on the 9th day of May, 1927, we find that a Resolution was on that date adopted by such body, providing for the issuance of the Series J State of Missouri Road Bonds, now under consideration. In providing for the form of the bonds to be issued, the Resolution set forth the following matters:

"This bond may be registered in the name of the owner, the registry to be certified hereon by the Treasurer of the State of Missouri, and the name of the registered owner of this bond to be written in the registration clause on the back hereof, together with the signature of the said Treasurer; after which no transfer shall be valid unless made by the registered owner in person or by attorney on the books of the said Treasurer, and the name of the newly registered owner similarly written on the back of this bond.

The Resolution further provided:

"BE IT FURTHER RESOLVED, that upon the surrender to the State Treasurer of any of the said State of Missouri Road Bonds, Series J, said Treasurer is hereby authorized to issue, in the name of the holder, State of Missouri Road Bonds, Series J, of like tenor, maturity and aggregate amount, in the denomination of FIVE THOUSAND DOLLARS (\$5,000), of TEN THOUSAND DOLLARS (\$10,000), of FIFTY THOUSAND DOLLARS (\$50,000), or of ONE HUNDRED THOUSAND DOLLARS (\$100,000), as may be requested, and the coupon bonds so surrendered and the coupons attached thereto shall be cancelled by the State Treasurer immediately upon the surrender thereof to him. The State Auditor shall prepare registered bonds similar in tenor as hereinafter prescribed and lodge them with the State Treasurer, and upon the surrender of any of the said State of Missouri Road Bonds, Series J, shall insert in such registered bond, or bonds, the name of the registered holder, the date of maturity, the number and such other matters as may be necessary to complete the same, to correspond in other respects to the surrendered coupon bond or bonds, or to correspond to the form of registered bond hereinafter prescribed; * * *

"Upon application of the holders of the registered bonds issued pursuant to the provision of this resolution and the act aforesaid, and upon presentation of such bonds at the office of the State Treasurer in the City of Jefferson

City, Missouri, the State Treasurer is authorized to transfer the same on the books to be kept in his office for that purpose, to such person or corporation as may be designated in the application. * * *

The Resolution further provided:

"BE IT FURTHER RESOLVED, that the State Treasurer shall keep in his office such book or books as may be necessary for the registration of the bonds; * * *"

The Resolution further provided for the form of the registered bonds, incorporating therein the following provisions:

"* * * This registered bond may be transferred by executing a duly acknowledged transfer or assignment thereof and by presentation to the State Treasurer, who shall register the said bond in the name of the transferee.

* * * * *

"Fully registered bonds of the denomination of FIVE THOUSAND DOLLARS (\$5,000), TEN THOUSAND DOLLARS (\$10,000), FIFTY THOUSAND DOLLARS (\$50,000), or ONE HUNDRED THOUSAND DOLLARS (\$100,000) may be surrendered and cancelled and coupon bonds of the denomination of One Thousand Dollars (\$1,000) each issued in lieu thereof on payment to the State Treasurer of ONE DOLLAR (\$1.00) per thousand of the par value thereof."

The Resolution further provided for the advertisement of the Proposal to receive bids for such bonds, and incorporated in the form of such advertisement the following:

"These bonds are coupon bonds, in the denomination of One Thousand Dollars (\$1,000), registerable as to principal, or as to principal and interest, and are exchangeable for fully registered bonds in the denominations of Five Thousand Dollars (\$5,000), Ten Thousand Dollars (\$10,000), Fifty Thousand Dollars (\$50,000), and One Hundred Thousand

Dollars (\$100,000), which fully registered bonds may again be exchanged for coupon bonds in the denomination of One Thousand Dollars (\$1,000) on payment of One Dollar (\$1.00) per thousand."

Pursuant to the Resolution of May 9, 1927, the Series J State of Missouri Road Bonds were offered for sale in accordance with the advertisement, and were thereafter sold.

You will note that at no place in the Resolution, nor in the Act authorizing the issuance and sale of such bonds, has any provision been made for the imposition of a charge for reregistering bonds which have been transferred. It is only upon the reconversion of such registered bonds to coupon bonds that provision for charge has been made. Reference to the entire Resolution and the form of bonds therein provided indicates the reason for this. No item of expense to the State is involved in registering the original coupon bonds, as such registration was made upon the bonds themselves and it was unnecessary that new certificates be issued. Further, the statute authorizing the issuance of the bonds provided for the exchange of the coupon bearer bonds for registered bonds, for which no charge could properly be made. The reason for the charge being imposed for reconversion of registered bonds back to coupon bearer bonds is understandable in the light of the fact that in such event the State of Missouri was necessarily placed to the expense of obtaining new bond forms to be used for the reconversion. This, to us, is the explanation for the charge made for the reissuance of the bond in changed form.

We understand that in the past it has been the practice to actually issue a new certificate when a registered bond was presented disclosing a transfer. We do not believe that this practice was contemplated, however, by either the Act authorizing the issuance of such bonds or by the Resolution providing therefor. We are persuaded to this view by reason of the fact that no specific provision for such charge appears in either the Act or the Resolution, and by further reason of the fact that the entire scheme relating to the transfer of registered bonds does not indicate that a new bond should be issued to the transferee. In the form of registered bond provided in the Resolution, there appears the following:

"INOW ALL MEN BY THESE PRESENTS: That the State of Missouri acknowledges itself indebted and, for value received, promises to pay to _____ or registered assigns, * * *

The underscored phrase, when considered in the light of the duties imposed upon the State Treasurer by the Act and the Resolution, clearly indicates to us that the transfer of title to such registered bonds is to be recorded solely upon the books of the Treasurer, the bond itself retaining its form as originally issued. This being true, no expense is incurred by the State in recording the transfer and reregistration, and therefore no valid reason exists for the imposition of any charge therefor.

While, as a matter of practice, it may have been more convenient to have actually reissued registered bonds upon transfer, yet, as has been noted above, we do not believe that such action was contemplated by either the Act or the Resolution. We note that in your request for this opinion you have incorporated the statement that the charge is made for reissuing and reregistering, and for that reason we have discussed the propriety of reissuing the registered bonds after transfer.

CONCLUSION

In the premises, we are of the opinion that the Board of Fund Commissioners of the State of Missouri does not have authority to make a charge of \$1.00 per thousand of par value of Series J State of Missouri Road Bonds for the reregistration of such bonds in the name of a transferee thereof.

We are further of the opinion that the Board of Fund Commissioners of the State of Missouri should not reissue such registered bonds upon presentation to said Board of a valid assignment of title thereto, but that such transfer of title and reregistration should be recorded upon the books kept by the State Treasurer, as contemplated by the statute and by the Resolution.

Respectfully submitted,

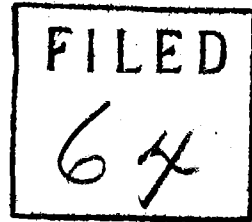
WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

OFFICIAL BONDS: Recommended changes in form of bonds and insurance policy for Department of Revenue.



August 8, 1946

8/16

Hon. M. S. Morris, Director
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date requesting an opinion with respect to certain bonds and endorsements attached thereto submitted with your letter of inquiry. Your opinion request read as follows:

"Enclosed please find copy of original and two original bonds issued by the National Surety Corporation, New York. The original of the first mentioned is held by Wilson Bell, Secretary of State, and the attached letter from the Central Missouri Trust Company as agent for the National Surety Corporation will explain the contemplated procedure. It is our understanding that

"1. Coverage represented by the duplicate will cover all moneys and securities handled by the Department of Revenue and our central office and any branch office, or while in transit, against the specified hazards.

"2. The public officials schedule bond applies to various deputy commissioners appointed in the outstate motor vehicle registration offices and the fidelity coverage for \$10,000.00 each.

"3. That the blanket position bond covers each employee in any capacity in the Department of Revenue, and provides fidelity coverage to the extent of \$10,000.00 for each and every employee.

"It is noted that the last mentioned bond is to the State of Missouri for use of the Department of Revenue.

"After examination of the bonds I would appreciate your opinion as to the correctness of the forms and whether or not in view of the provisions of SCS for SB 297, the bonds should state that they are for the use and benefit of the Department of Revenue and be assigned to the Department of Revenue, or if the Collector of Revenue and other divisions of the Department which obviously require bonds should be mentioned. I will appreciate the return of the attached letter with the bonds following your examination.

"This procedure seems necessary in order that we may take advantage of the premium which has been paid on this coverage, and which the company is willing to transfer to the Department of Revenue to avoid any cancellation charge."

With respect to the understanding you have arrived at as shown by paragraph 1 of your letter, the following suggestions are offered in connection with the form and conditions of policy numbered B. F. 1142841 of the National Surety Corporation:

(a) The endorsement attached to the policy numbered B. F. 1142841 names as obligee Wilson D. Bell, Secretary of State, and/or M. E. Morris, Director of Revenue. We are at a loss to understand the reason for the policy being in this form inasmuch as it is primarily designed to protect the Department of Revenue from loss of money and securities under that department's control. It is suggested that the policy name as sole obligee the State of Missouri for the use and benefit of the Department of Revenue.

(b) You indicate in paragraph 1 of your letter that the understanding is that the policy will protect all money and securities under the control of the Department of Revenue both in your central office and any branch office, or while in transit. The coverage extended under the policy is a maximum of \$100,000.00 against direct loss of money and securities occurring within the premises and caused by the actual destruction, disappearance or wrongful abstraction thereof. This insuring clause appears as Item I of the policy. Under the

endorsement attached to the policy, "premises" is defined as being the interior of that portion of any building which is occupied solely by the assured in conducting its business. The maximum coverage afforded by the policy with respect to loss of money and securities occurring outside the premises, as disclosed by Item II, is the sum of \$40,000.00. Your attention is directed to the fact that such coverage is afforded only when such money and/or securities are being conveyed by messengers in accordance with the endorsements attached to said policy. Further, specific warranties on the part of the obligee are incorporated in the endorsement relative to conveying money and securities from the location at 7814 Forsythe, Clayton, Missouri, that messenger will be accompanied by one guard, and from the location at the corner of 4th & St. Charles Streets, St. Louis, Missouri, that messenger will be accompanied by one guard when conveying property valued up to \$10,000.00 and by two guards when conveying property in excess of \$10,000.00, and that messenger travel in private vehicle. Further, by additional endorsement, the coverage purported by Item I applies only to the maximum of \$5,000.00 from within any new premises, and that only after written notice of the establishment of such new premises is given the company within thirty days thereafter and the necessary additional premium paid. The same endorsement further provides that the coverage afforded under Item II of the policy is limited to the amount of \$5,000.00 while being conveyed by messengers, accompanied or unaccompanied by a guard, in addition to the messengers described in the schedule.

With respect to the understanding you have of the coverage afforded by the Public Official Schedule Bond of the National Surety Corporation as shown in paragraph 2 of your letter, the following suggestions are submitted:

(a) This bond originally named the State of Missouri for the use and benefit of Wilson Bell, Secretary of State, as obligee, and by endorsement has been changed to name as such the State of Missouri for the use and benefit of M. E. Morris, Director of Revenue. It is thought that the obligee in this bond should be the State of Missouri for the use and benefit of the Department of Revenue.

(b) You are correct in your understanding that the fidelity coverage is in the amount of \$10,000.00 on each official named in the schedule. Your attention is also directed to the fact that new employees or employees not previously covered, who succeed to a position vacated during the next preceding thirty days by an employee who was then covered, or who occupy a newly created position, are covered only to the amount of \$5,000.00. To provide the coverage of \$10,000.00 for such

successor or new employees, it is necessary that they be scheduled.

With respect to your understanding of the coverage afforded by the Public Employees Blanket Position Bond of the National Surety Corporation as shown by paragraph 3 of your letter, the following suggestions are submitted:

(a) This bond names as obligee the State of Missouri for the use and benefit of the Department of Revenue, and is in proper form in that regard.

(b) Under certain circumstances, the maximum penalty which might be collected under the bond would be the sum of \$10,000.00. This limitation would result if the obligee should be unable to designate the specific employee or employees causing a loss. This limitation appears in Item 3 of the bond and specifically provides that the aggregate liability of the surety for any such loss shall not exceed the bond penalty. "Bond penalty" is defined in the first paragraph of the bond and fixed at the sum of \$10,000.00.

(c) In accordance with Item 8 of the bond, such bond shall not be construed as one required by law.

The letter received by you from the Central Missouri Trust Company Insurance Agency, Jefferson City, Missouri, together with the three proposed bonds are returned herewith.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Applicable personal exemptions to be allowed under Missouri income tax law for 1946.



August 20, 1946

8/27

Honorable M. E. Morris
Director of Revenue
Jefferson City, Missouri

Attention: Mr. W. H. Holman, Supervisor
Income Tax Unit, Division of Collection

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"The present Missouri state income tax law provides for certain personal exemptions in Section 11351, R. S. Missouri, 1939, while House Bill #676 which was recently signed by Governor Donnelly provides larger personal exemptions than Section 11351.

"Please advise whether the allowable personal exemptions for the year 1946 will be the exemptions provided under the new law, or will it be necessary to prorate these exemptions according to the number of months each law was in effect.

"It is requested that you furnish this department with an opinion in this matter."

House Bill No. 676 of the 63rd General Assembly, referred to in your letter, became effective on July 1, 1946. Among other provisions incorporated therein, there appears Section 11351, reading, in part, as follows:

"For the purposes of this tax, there shall be allowed as an exemption in the nature of a deduction from the amount of the net income of each resident individual, ascertained as provided herein, the sum of \$1,200 plus \$1,200 additional if the person making the return be the head of a family, or a married man with a wife living with him, or plus the sum of \$1,200 additional if the person making the return be a married woman with a husband living with her; but in no event shall this additional exemption of \$1,200 be deducted by both a husband and a wife: Provided, that only one deduction of \$2,400 shall be from the aggregate income of both husband and wife when living together: Provided, further, that if the person making the return is the head of a family there shall be an additional exemption of \$400.00 for each person dependent upon such head of a family if related by blood or marriage if said dependent receives more than one half of his or her support from the person making the return, * * *

Comparison of this statute with Section 11351, R. S. Mo. 1939, discloses that increased personal exemptions are now allowable, namely, \$1,200 in the case of single persons, rather than \$1,000, previously allowed; \$2,400 in the case of married persons filing joint returns, rather than \$2,000, as previously, and \$400 for dependents, rather than \$300, as previously.

It is a primary rule of statutory construction that all statutes relating to the same subject matter must be construed together. In this regard, we direct your attention to the case of State v. Naylor, 40 S. W. (2d) 1079, 328 Mo. 335, from which we quote:

"We do not lose sight of the fact that all statutes that may be applicable must be read and construed together and, if possible, harmonized. * * *

Applying this rule to the question at hand, we note that incorporated in House Bill No. 676 were two further provisions relating to exemptions. For instance, Section 11343 contains the following:

" * * * exemptions shall be prorated and per centum of tax levied shall be allocated to portions of any year where entire year is not covered or different rates may prevail. * * *"

We also find the same phraseology employed in subsection (c) of Section 11343.

Consideration of these clauses found in other parts of the act indicates to us that it was the intention of the Legislature that with respect to exemptions, such exemptions should be prorated for the portion of the year to which they are applicable.

That the Missouri income tax is not a unit was held by the Supreme Court en Banc, in *Graham Paper Co. v. Gehner*, 59 S. W. (2d) 49, wherein the court said, after referring to the decision reached in *Reed v. Swan*, 133 Mo. 100, 34 S. W. 483:

"This last holding effectually answers the contention made here that the income tax for a given year is a unit and not proportionable for a part of the year at one rate and for another part at another rate, * * * and that prior to the maturity date it does not have even a potential existence or rise to the dignity of an obligation."

The case of *Graham Paper Co. v. Gehner*, supra, is in many respects analogous to the situation presented by the enactment of House Bill No. 676. That case was for the purpose of obtaining a construction of an amendment to the existing Missouri income tax law, the amendment, in effect, providing that subsequent to July 3, 1927, a different method should be used for the purpose of determining the net income of corporations than that employed for that portion of the year prior to such date. So far as the particular taxpayer who was plaintiff in that action was concerned, the amendment had the effect of increasing the tax due. Collection of the increase was resisted on the ground that the entire tax should be computed on the basis provided by the law before amendment. That the Legislature might properly provide for a different rate to be levied upon the net income of taxpayers for different portions of the same tax year was distinctly held in the case, the court saying, 1. c. 51:

"In *State ex rel. Koeln v. Southwestern Bell Telephone Company*, 316 Mo. 1008, 1011, 292

S. W. 1037, this court said: 'Whether a tax rate may be different for different parts of a year, instead of taking the year as a unit for taxation purposes, was settled by this court in case of Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510. The Legislature may provide for an income tax rate prevailing part of the year with a different rate for the other part of the year.'

Although the opinion refers to the action of the Legislature in amending the 1927 income tax law as a "different rate," such in fact was not the case. What had been changed by the amendment was the basis for determining the net income to which the rate was applicable. Earlier in the opinion, l. c. 49, the court had said: "The rate of taxation was continued at 1 per cent." Reference to the legislative proceedings discloses this to be true.

We think the same reasoning to be applicable to your question relative to the personal exemptions which have been increased. It might be argued that the new personal exemptions should be allowed to the net income derived for the entire year. We do not believe, however, that this position would be tenable in that it does not rest within the power of the General Assembly to authorize the releasing or extinguishing of any indebtedness, liability or obligation due the state or any county or municipal corporation. We quote again from Graham Paper Co. v. Gehner, cited supra, l. c. 51:

"In this connection the plaintiff contends that although the amended law of 1927 is retrospective in its operation if construed to cover a period antedating the time it went into effect, yet as it is detrimental to the state only, and not to the taxpayer, there is no valid objection, so far as the state is concerned, to the law being retrospective. The provision of the Constitution inhibiting laws retrospective in their operation is for the protection of the citizen and not the state. The law is stated in 12 C. J. 1087 thus: 'The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions

thereof.' See New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521. This merely means that such laws are retroactive in their operation, but that the sovereign state may forego or waive its own rights and may be held to have done so by the enactment of the law called in question. It is therefore argued with much force that the act in question merely reduced the income taxes to be collected by the state, beginning with January 1, 1927, and though the act did not go into effect till July 3, 1927, the state could lawfully impair its own rights and relieve the taxpayer of part of the burden of taxes already incurred. Defendants' reply to this is that if the constitutional provision against retrospective laws is available to citizens only, and not to the state, there is another constitutional provision equally effective and clearly applicable in favor of the state as against legislative enactments purporting to release or extinguish obligations or liabilities to the state or any governmental subdivision of the same, to wit, section 51 of article 4 of the Constitution, which provides: 'The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein.' The language of this constitutional provision is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind. It will be noticed that this constitutional provision is couched in the language and uses the same terms as are used with reference to retrospective laws. In determining what transactions or considerations are within the purview of retrospective laws, the courts

use the same terms as are used in this constitutional provision, to wit, liabilities or obligations, as well as debts. In contending in the *Direkx* and *Bell Telephone Cases*, supra, that income taxes not due or capable of ascertainment till the end of the year could not be the subject of a retrospective law, the same argument was used as is now used to exclude same from the constitutional provision just quoted, to wit, that the income tax for the entire year is a unit and does not come into existence even as an obligation or liability till the end of the year, when for the first time it was capable of ascertainment. That would be true as to being an indebtedness, but, as there pointed out, it is not true as to being an obligation or liability. This argument was rejected as not sound in the *Direkx* and *Bell Telephone Cases*, as it must be here. It was there held that an inchoate tax, though not due or yet payable, is such an obligation or liability as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered. In other words, if an unmatured tax has sufficient vitality to be protected in favor of the citizens against retrospective laws, it has sufficient vitality to be protected in favor of the state against being extinguished or released by legislative enactment." (Emphasis ours.)

The constitutional provision upon which the above holding was bottomed, namely, Section 51, Article IV, of the Constitution of 1875, has been readopted in the Constitution of 1945 and appears as subsection (5) of Section 39, Article III thereof. It reads as follows:

"The general assembly shall not have power:
* * * (5) To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any

corporation or individual due this state or
any county or municipal corporation: * * *

Under this rule the General Assembly could not enact a law which would have the effect of releasing the obligation for income tax computed under a prior law for a portion of the tax year, and we believe that the General Assembly was fully cognizant of this fact when it incorporated in other sections of House Bill No. 676 the quoted provisions relating to the proration of exemptions.

CONCLUSION

In the premises, we are of the opinion that the exemptions allowable in 1946 against net income for the purpose of determining the Missouri income tax for such year should be the aggregate of the proportionate part of such exemptions allowable under the provisions of Section 11351, R. S. Mo. 1939, for the portion of the calendar year 1946 said statute was in effect, and the proportionate part of such exemptions allowable under the provisions of Section 11351, found in House Bill No. 676 of the 63rd General Assembly, for the portion of the calendar year 1946 that said section is in effect.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Liability for ad valorem tax on intangible personal property owned by religious educational and charitable institutions.

October 7, 1946

Honorable M. E. Morris
Director of Revenue
Jefferson City, Missouri



Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Enclosed herewith is a copy of letter from Ben A. Glassen, Chairman of the Legislative Committee of the Missouri Bankers Association. This letter inquires whether religious, educational and charitable institutions holding intangible personal property for non-profit use are subject to the new intangible tax. The position of this Department has been that they are not exempt.

"We will be very glad to have an official opinion from you as soon as convenient relative to the questions presented in the enclosed letter."

The letter received by you and referred to in your opinion request reads as follows:

"After a review of House Committee Substitute for House Bill 868 and the 1945 Constitution we are wondering if religious, educational and charitable institutions holding intangible personal property for non-profit use are or are not subject to taxation. Section 6 of the 1945 Constitution is as follows:

"Sec. 6. Exemptions from Taxation.-- All property, real and personal of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void.'

"Thus, real and personal property of the state, county and other political subdivisions and non-profit cemeteries are exempt from taxation by reason of Constitutional provision. Certain other specified groups holding personal property may be made exempt at the pleasure of the Legislature. The new Constitution prohibits exemption of groups by the Legislature except in these mentioned instances.

"House Committee Substitute for House Bill 868 under Section 1 (A) defines the groups eligible for taxation thereunder. That section follows: 'Section 1. (A) The term person includes any individual, firm, co-partnership, joint adventure, association, corporation, company, estate, trust, syndicate, executor, administrator, receiver or trustee appointed by the state or federal court, or any other group or combination acting as a unit, and the plural as well as the singular number.' It will be noted that in this section and also no where else in the bill is there any mention made of group exemption. Rather the last phrase of Section 1 (A) seems to include certain generally recognized charitable and religious groups holding property for non-profit purposes which have previously been exempt.

"The Constitution of 1875 Article X, Section 6 provides basic law for exemption of this

type of property from taxation. Section 1 of the Schedule of the 1945 Constitution provides that the Constitution of 1875 is superseded by the Constitution of 1945 except that, under Section 2, laws in force at the time of the adoption of the new Constitution and in agreement therewith are to remain in full force and effect, those inconsistent expiring July 1, 1946. It would thus seem that if the Legislature had exempted the groups in question, from taxation, under the Constitution of 1875 that such exemption would still be valid, inasmuch as the Constitution of 1945 permits such an exemption, except for the fact that Section 1 (a) of House Committee Substitute for House Bill 868 seems to specifically include these groups.

"In this area there are many educational, social and religious groups owning intangible personal property wherein the property is not held for private or corporate profit. We are desirous of determining whether or not they are required to file a return under House Committee Substitute for House Bill 868.

"The contents of this letter is the outgrowth of a conversation between Mr. Haynes and myself during a visit at my office here this morning. We thought best to give you this in order that we may have your comment and suggestion in the matter."

Section 6 of Article X of the Constitution of Missouri of 1945 reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All

laws exempting from taxation property other than the property enumerated in this article, shall be void." (Emphasis ours.)

Pursuant to the constitutional authorization contained in the provision quoted, the 63rd General Assembly has enacted H.C.S.H.B. 471, which contains as a part of Section 5 thereof, the following:

"The following subjects shall be exempt from taxation for state, county or local purposes: * * * Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

The particular matter under consideration being one involving the construction of a tax exemption statute, we deem it well to quote the following from Cooley on Taxation, Vol. 2 (4th Ed.), pp. 1403-1408, cited with approval in St. Louis Y. M. C. A. v. Gehner, 47 S. W. (2d) 776, 81 A. L. R. 1449:

"An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public.

This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute the favor would be intended beyond what was meant.' Cooley Taxation, vol. 2 (4th Ed.) pp. 1403-1408."

Bound by this rule of strict construction of tax exemption statutes, we necessarily must consider the effect of the incorporation by the General Assembly in the statute under consideration of the phrase "actually and regularly used exclusively" for the designated purposes.

It will be noted at the outset that "ownership" of the property has not been adopted as the determining factor in deciding whether or not exemption shall exist. The exemption must rest upon the actual and regular exclusive "use" of the property for the purposes for which exemption is granted.

We are unable to find any Missouri appellate court decisions to guide us in the determination of the precise question. Under sections 6 and 7 of Article X of the Constitution of 1875, the General Assembly was authorized to exempt from taxation real property when used for similar purposes, but no authorization was granted for the exemption of personal property. There was, however, authority to exempt personal property used exclusively for agricultural or horticultural societies, and pursuant to this authority, Sections 5519 and 10938, R. S. Mo. 1939, were adopted. Neither of these sections, though, were ever construed by the appellate courts with respect to the exemption of personal property.

Honorable M. E. Morris - 6

We do note that in *Salvation Army v. Hoehn*, 188 S. W. (2d) 826, the Supreme Court of Missouri incorporated the following construction of the phrase "exclusively used" which appears in the constitutional and statutory provisions under consideration in this opinion:

"The phrase 'exclusively used' has reference to the primary and inherent use as over against a mere secondary and incidental use. *People ex rel. v. Lawler*, 74 App. Div. 553, 77 N.Y.S. (840), loc cit. 842, et seq. * * *"

That this is in accord with the rule as applied in other jurisdictions appears in *Central Realty Co. v. Martin*, 30 S. E. (2d) 720, l. c. 724, from which we quote:

"Income from property is an incident of ownership, but cannot always be identified with the use of property. We do not mean that the exemption clause of the Constitution should be applied with the same rigor to all property. The physical use of land is a thing apart from the income derived therefrom. The uses of land being many and varied supply the numerous needs of humanity. * * * The correct rule is stated in the syllabus in the case of *State v. Martin*, supra: 'Under section 1, art. 10, Const., the exemption under taxation depends on its use. To warrant such exemption for a purpose there stated, the use must be primary and immediate, not secondary or remote.' * * * Where property constitutes part of the corpus of an educational and eleemosynary trust, subject to a lien held by a private person, the income from which is used solely to discharge a portion of the lien debt against the property, it is not exempt from taxation. * * *"

Also, to the same effect and further developing the distinction to be drawn between an exemption based upon "ownership" and one based upon "use," we cite the opinion in *County Commissioners v. Colorado Seminary*, 21 Pac. 490, from which we quote:

"Thus, under the view of counsel for appellee, ownership becomes the test of exemption

from taxation. But if the legislature had intended to establish this test, that body would doubtless have so declared; thereby simplifying the provision, and avoiding the present and like controversies. * * * The thought that ownership was intended to be the test is expressly negatived. The clause, 'while used exclusively for such purpose,' especially when coupled with the preceding expression, 'such property as may be necessary,' etc., denotes an intention to make something else besides ownership the criterion. * * * We are aware of no instance where use, and not ownership, was by constitution or statute made the test of exemption, in which it has been held that property situated like the land here in question was exempt from taxation.
* * * "

While the quoted opinions relate to the use of real property, a similar conclusion has been reached by the Supreme Court of Illinois with respect to the use of intangible personal property. We quote from *Smith et al. v. Board of Review*, 136 N. E. 787, 34 A.L.R. 667:

"It is further urged by counsel for the trustees that as the proceeds from the promissory notes and the shares of stock were all used for the support of the home, said notes and shares should be held exempt from taxation. This court has held that credits consisting of bonds and secured notes belonging to a school, the proceeds of which are used toward the support of the school, are not exempt from taxation; that the fact that the rents, revenues, and income of property are devoted to school purposes does not exempt the property itself from taxation; that the property itself must be used for school purposes before it is entitled to be held exempt. * * *"

This decision was reached under a constitutional provision which was interpreted by the same court, in the same case, in the following language:

Honorable M. E. Morris - 8

"* * * This court has held that the Constitution and laws of this state contemplate that only property actually and exclusively used for charitable purposes shall be exempt from taxation, * * *."
(Emphasis ours.)

We believe that a similar result would be reached by the appellate courts of Missouri in construing the phrase "actually and regularly used exclusively," as used in H.C.S.H.B. 471 of the 63rd General Assembly.

CONCLUSION

In the premises, we are of the opinion that intangible personal property owned by religious, educational and charitable institutions is subject to the Missouri intangible personal property tax law.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

OFFICIAL BONDS: Director of Department of Revenue has no official
duties with respect to bonds of township collectors.

FILED

64

October 24, 1946

107/28

Mr. A. E. Morris, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading, in part, as follows:

"Under the provisions of House Bill 531, it appears that county collector bonds shall be transmitted to the Director of Revenue and if found to be made in conformity with law, and the sureties satisfactory, the Director shall file same with the Secretary of State and certify the fact to the County Clerk.

"Please advise if township collector bonds are included under the provisions of this act, and if the enclosed bond is in proper form, etc."

House Bill No. 616 of the 63rd General Assembly, which became effective January 6, 1946, contains the following provision with respect to the bonds of township collectors, as a part of Section 15953:

" * * * The township collector shall before he receives the tax books, give bond and security to the state, to the satisfaction of the county court, in a sum equal to one-half the largest amount collected during any one year preceding his election or appointment, including school taxes; such bond shall be executed in duplicate; one part thereof shall be de-

Mr. M. E. Morris - 2

posited and recorded in the office of the clerk of the county court, and the other part shall be transmitted by the clerk to the State Tax Commission. * * *

From the foregoing, it appears that no duties have been imposed upon the Director of Revenue with respect to the official bonds of township collectors.

CONCLUSION

In the premises, we are of the opinion that no duties have been imposed upon the Director of the Department of Revenue with respect to the official bonds of township collectors in counties under township organization.

The bond submitted with your opinion request is returned herewith.

Respectfully submitted,

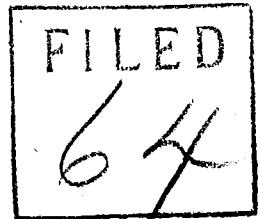
WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Necessity of filing returns for Missouri intangible personal property tax by joint owners.



October 29, 1946

Mr. H. H. Morris, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you furnish this department with a written opinion advising whether or not two individuals having a joint savings account, or any other item covered by the intangible tax law as set forth in House Bill #868, would be required, or permitted, to file a joint return on such joint earnings."

You have referred to the intangible personal property as being "jointly" owned. Such being the case, it is pertinent to determine the precise legal meaning of this term.

We find the word "joint" defined in Black's Law Dictionary, 2nd Ed., as follows:

"United; combined; undivided; done by or against two or more unitedly; shared by or between two or more." (emphasis ours.)

Also, the following definitions of "joint," "joint ownership" and "jointly" appear in Vol. 25, Words and Phrases, Perm. Ed., pages 43 and 93, and Pocket Part, page 33:

"The word 'joint' means united or coupled together in interest or liability, opposed to several. *Mavromates v. Hutchinson*, 183 N.E. 291, 293, 43 Ohio App. 365."

"The words 'joint' and 'general' import unity, as distinguished from the word 'separate,' which implies division and distribution. Merrill v. Pepperdine, 36 N.W. 921, 922, 9 Ind. App. 413."

"Joint means, according to Bouvier, a common property interest enjoyed or a common liability incurred by two or more persons. As applied to real estate, it involves the idea of survivorship. State v. Maick, 89 N.W. 183, 186, 113 Wis. 239."

"To constitute 'joint ownership' the shares must generally extend to the whole estate and be such as that neither of the owners would have an interest in the proceeds set apart to the other joint owner. Fullenwider v. Johnson, 139 S.W. 1096, 1097, 145 Ky. 19."

"The word 'jointly' means in a joint manner; together, unitedly, not separately. It has a general meaning of plurality. More than one, both, all, and the like. It means in a joint manner, in concert; in conjunction; not separately, together, united. White v. Powell, 20 So. 2d 467, 469, 246 Ala. 356."

From the foregoing definitions, it is clear that joint ownership embodies the idea, not alone of plurality of owners, but also that the ownership of the several owners extends to the entire subject-matter. The interests are undivided and are not separable.

Such being the case, we direct your attention to subsection (A) of Section 1 of H.C.S.H.B. No. 368 of the 63rd General Assembly, wherein the following definition of the term "person" is found:

"The term person includes any individual, firm, co-partnership, joint adventure, association, corporation, company, estate, trust, business trust, syndicate, executor, administrator, receiver or trustee appointed by the state or federal court, or any other group or combination acting as a unit, and the plural as well as the singular number." (Emphasis ours.)

Your attention is further directed to a portion of Section 2 of the same Act, relating to the liability for filing returns for the calendar year 1946:

" * * * The person who on July 1, 1946, owned the legal title to or equitable title or beneficial interest in intangible personal property subject to this property tax thereon, shall be liable for said tax."

With respect to subsequent calendar years, the following provisions are found in Section 5 of the same Act:

"The tax for the year 1947 and each succeeding year shall be apportioned among those persons who during the preceding calendar year held or acquired the legal title to or equitable title or beneficial interest in intangible personal property subject to the property tax provided by Section 4 of this Act, according to the part of the entire yield of such property which they respectively received during the preceding calendar year, and each such person shall be liable for his resultant portion of said tax." (Emphasis ours.)

Reading into the portions of the Act quoted supra, the meaning to be accorded the term "person," as defined in the Act, it becomes apparent that in the event of joint ownership of intangible personal property subject to the tax provided in H.C.S. H. B. No. 868 of the 63rd General Assembly, the return of such property should be made by the joint owners.

CONCLUSION

In the premises, we are of the opinion that joint owners of intangible personal property subject to the tax imposed under the provisions of H.C.S.H.B. No. 868 of the 63rd General Assembly should make return of such intangible personal property for purposes of taxation.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND: In r.: Investment certificates subject to intangible
REVENUE: personal property tax under H.C.S.H.B. No.
868.

November 8, 1946

FILED

64

11/25

Mr. M. E. Morris
Director, Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Mr. Morris:

Receipt is acknowledged of your letter with the enclosed correspondence from Mr. R. W. Peterson, Associate Counsel for Investors Syndicate of America, Incorporated, and the sample form of an investment certificate issued by that company. In your letter you inquire if the holders of investment certificates of Investors Syndicate of America would be required to report annually under the Missouri Intangible Personal Property Tax Law.

In answering your question we must first determine whether or not the investment certificate is a type of intangible personal property taxable under the law. Under H.C.S.H.B. No. 868, passed by the 63rd General Assembly and approved on April 19, 1946, the term "intangible personal property" is defined in sub-section (B) of Section 1 as follows:

"Intangible personal property means moneys on deposit; bonds (except those which under the constitution or laws of the United States may not be made the subject of a property tax by the State of Missouri); certificates of indebtedness (other than capital notes issued by banks or trust companies); notes, debentures, annuities, accounts receivable; conditional sales contracts (which have incorporated therein promises to pay) and real estate and chattel mortgages."

Under the terms of the sample certificate enclosed the purchaser may pay a certain number of annual installments and thereafter the company is obligated to pay him a certain amount. Under this particular certificate the purchaser

could pay \$550.00 per year for fifteen years and at the expiration of that period he would receive \$10,000.00. The certificate also has certain cash surrender values which entitle the holder to receive a specific amount of money depending upon the time that he surrenders the certificate. Another feature of the instrument is that the holder may elect to receive certain payments under options "A" or "B" as set forth in Article 13 of the instrument.

We observe that the certificate in question is styled "Investment Certificate". In the case of City Bond and Finance Co. vs. Welch (D. C. Cal.), 9 Fed. Supp. 500, it is held that certificates issued by the City Bond and Finance Co. as evidence of interest acquired by purchasers in securities purchased on the installment plan, and denominated "Investment Savings Plan" were subject to the stamp tax imposed by the Federal Revenue Act on certificates of indebtedness. At l. c. 501, the court said:

"* * * On the face of this certificate the transaction was denominated 'Investment Savings Plan.' It set forth that the City Bond & Finance Company had agreed to 'sell and deliver' named securities at the stated price per share, set forth amount paid and installments to be paid.
* * * *.

"Plaintiff contends that the certificates did not require stamps as they were not certificates of corporate stock nor certificates of indebtedness, as described in the Revenue Act of 1926 (section 800 (26 USCA Sec. 901 and note)).

"I will not review the authorities but state my conclusions. It has been held that acts of the kind here concerned are to be given broad application. There are decisions holding uniformly that the documents will be taken at its face, and that no close scrutiny will be made of the purpose which has prompted its use. Certificates of participating interests in securities held by a corporation have been held to be within the provisions of the act. To my mind the certificates issued by plaintiff may be termed certificates of indebtedness or certificates

of interest in certain securities of plaintiff corporation.* * * *"

After careful examination of the certificate at hand we believe it contains the characteristics to constitute it a "certificate of indebtedness" and certificates of indebtedness under H.C.S.H.B. No. 868 being classed as intangible personal property would therefore bring the investment certificate within the taxable classification.

Under H.C.S.H.B. No. 868, supra, the basis for valuing intangible personal property for purposes of taxation is the yield derived therefrom. Therefore, the intangible personal property must have a yield before it is taxable. In sub-section (c) of Section 1 of the Act the term "yield" is defined as follows:

"Yield means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital."

By applying the above definition to the terms of the instrument, we believe that upon maturity or surrender of the certificate the cash surrender value or maturity amount received by the holder in excess of the amount paid in would constitute a yield exclusive of any return of capital and the certificate would be subject to a tax at the rate of 4% of such yield.

We observe that the yield of intangible personal property may be in a form other than money, for, under sub-section (C), supra, the aggregate proceeds received in "credits" would also constitute a yield. Under the terms of the certificate, after the expiration of one year, the holder may surrender the certificate and receive the computed cash surrender value. There is a definite obligation on the company to pay the cash surrender value when the certificate is properly surrendered.

In the case of Commissioner of Internal Revenue v. Stearns, 65 Fed.(2d) 371, the question arose whether or not an administrator, in filing an income tax return for an estate, was entitled to deduct the sums that were credited to the residuary legatees. At l. c. 373, the court said the following:

"* * *It is reasonable to allow deductions to a fiduciary of what he is under an absolute obligation to pay, whether he had done so or not, and whether he has credited the payments to the beneficiary or not; they are by hypothesis the beneficiary's by the terms of the will or deed, and he

can enforce their payment. * * * Such distributions, and distributions at the discretion of the fiduciary, must be actually made, or irrevocably fixed, before they become the beneficiary's as of right. They should appear in the fiduciary's return, if they are still his; in the beneficiary's only in case he has become presently entitled to them, or received them.

"(4-6) This serves to determine what is meant by the word, 'credited,' the alternative to 'paid,' though we can find no authority on the point. The income must be so definitively allocated to the legatee as to be beyond recall; 'credit' for practical purposes is the equivalent of 'payment.' * * *

Again, in the case of Talley v. Brown, 125 N. W. 248, 146 Iowa 360, under a statute making real and personal property and credits subject to taxation the court held that the claims for loss under fire insurance policies were taxable. At N. W. l.c. 250, the court said:

"* * * To authorize the assessment of the policies as credits, it was not essential that the assessor know whether the claims were for money or might turn out to be for property, for in either event they would be assessable as credits, though these matters would have an important bearing in estimating the value of such claims. We are of the opinion that the claims for loss under the policies were subject to taxation."

The term "credits" is also defined in Volume 10, Words and Phrases, Perm. Ed., page 437, as follows:

"* * * 'Credits,' as used in Act No. 170 of 1898, Sec. 91, par. 4 necessarily implies the idea of a 'debt' or obligation to pay the amount of the 'credit,' and 'debt' is an unconditional obligation to pay a sum certain at a future time. What is a 'debt' on one side is a

'credit' on the other, so that 'credits' can have no broader meaning than 'debts'; 'credits' being in effect, the mere legal right with which one is clothed to demand the delivery of money or other property in the future. * * * *
Kansas City Life Ins. Co. v. Hammett,
149 So. 525, 526, 177 La. 930."

In the instant case, by the terms of the instrument, the certificate holder at the end of each year prior to the maturity date is entitled to receive a certain cash surrender value upon the surrender of the certificate and each year the cash surrender value is greater. It is therefore our notion that at the time the surrender value of the certificate would exceed the amount paid in, the excess would constitute a yield in the form of a credit and as such the certificate would be subject to a tax of 4% of such yield. For example, under Article 9 of the sample certificate, at the end of the eighth year the cash surrender value would only equal the amount paid in and there would be no yield, however, at the end of the ninth year the cash surrender value would exceed the amount paid in by \$130.00 which would constitute a yield in the form of a credit exclusive of any return of capital and would be a basis for taxing the certificate at the rate of 4% of such yield. At the end of the tenth year the cash surrender value would exceed the amount paid in by \$380.00 and the taxable yield would be \$380.00 less \$130.00, the amount paid on the previous year. The same procedure would be carried out until the maturity date of the certificate. Thereafter should the certificate holder elect to receive interest on the maturity amount as provided in either option "A" or option "B" in Article 12, the taxable yield would be the interest received.

Section 2 of H.C.S.H.B. No. 868 provides for the payment of a tax on intangible personal property for the year 1946 and reads as follows:

"Except as otherwise provided by law, intangible personal property having a taxable situs in the State of Missouri on the first day of July, 1946, shall be subject to a property tax for the year 1946. Said tax on said intangible personal property shall

be based on the yield of said property during the calendar year 1945, and the rate of said tax shall be four per cent (4%) of such yield. The person who on July 1, 1946, owned the legal title to or equitable title or beneficial interest in intangible personal property subject to this property tax thereon, shall be liable for said tax."

Under the above section a person who had legal title or equitable title or beneficial interest in an investment certificate on July 1, 1946, would have to pay a tax on the certificate based upon its yield in the calendar year of 1945.

Section 4 of the Act provides for the payment of the tax in succeeding years and, in part, reads:

"* * *Said tax on said intangible personal property for the year 1947 and each succeeding year shall be based on the yield of said property during the preceding calendar year,
* * *"

CONCLUSION

It is, therefore, the opinion of this department that an investment certificate of Investors Syndicate of America, Incorporated, is an intangible personal property in the form of a certificate of indebtedness and as such falls within the taxable classification under H.C.S.H.B. No. 868. Persons holding the legal title or equitable title or beneficial interest in these certificates would be required to file with the Department of Revenue a tax return on such property any year whenever, on the preceding calendar year, a yield was received in the manner herein described.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General

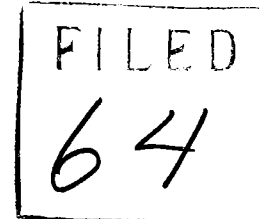
J. E. TAYLOR
Attorney General

RFT:mw

TAXATION AND REVENUE:

National banks not required to file return of income for Missouri income tax purposes.

November 19, 1946



Mr. M. E. Morris, Director
Department of Revenue
Jefferson City, Missouri

Attention: Mr. Haskell Holman, Supervisor
Income Tax Unit

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Will you please furnish this department with a written opinion advising whether or not national banks will be required to file a Missouri state income tax return for the year 1946 or 1947."

Consideration of the question presented involves a determination of the immunity from state taxation enjoyed by national banks. This become necessary by reason of the judicial decisions that such banks are instrumentalities of the federal government and that, therefore, no inherent power exists in the respective states to subject their capital, franchises or operations to taxation without the consent of the federal government.

We direct your attention to Citizens' & Southern Nat. Bank v. City of Atlanta, 46 F. (2d) 88, affirmed 53 F. (2d) 557, from which we quote:

"Since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, the banks of the United States have been considered instrumentalities of the federal government, whose capital, franchises, and operations are therefore not taxable by the states by virtue of

state powers of taxation, but only by virtue of such consent as the federal government may give. *Owensboro National Bank v. City of Owensboro*, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850. * * * The permission to tax national banks and their shareholders in force at present is found in 12 U. S. Code, sec. 548 (12 USCA sec. 548), as amended by the Act of March 25, 1926, and carefully observes this distinction. It permits no direct taxation of the bank on its property except its real estate, but allows a tax on its net income, or permits taxation of the shares, or of dividends on them to the owner, but any one form of the permitted taxation is in lieu of all the others. * * *

12 U.S.C.A., Sec. 548, referred to in the opinion *supra*, reads, in part, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause. * * *" (Emphasis ours.)

(Note: Subdivision (c) contains no matter pertinent to this opinion.)

Pursuant to the authorization granted to the respective states under the above provision, the 63rd General Assembly has elected to tax shares of national banking associations located in this state in accordance with method (4) of the statute quoted. We direct your attention to Section 3 of House Bill No. 888 of the 63rd General Assembly, reading, in part, as follows:

"A. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, and every other banking institution as herein defined shall be subject to an annual tax for the privilege of exercising its corporate franchises within the State of Missouri according to and measured by its net income pursuant to the provisions of this Act."

In view of the fact that method (3) of 12 U.S.C.A., Sec. 548, does permit a state to adopt the taxation of net income, which method has been rejected by the General Assembly of Missouri by the enactment of House Bill No. 888, under which election has been made to tax such banks under method (4), we believe that the State of Missouri is thereby precluded from taxing the net income of such banks by virtue of the provision that such election, when made, and the tax imposed thereunder, shall be in lieu of the others.

One further matter might be discussed in connection with this opinion. It is true that under the construction of the Missouri income tax laws the Supreme Court of Missouri has held that such a tax is not one upon property. See *Ludlow-Saylor Wire Co. v. Wollbrinck*, 205 S. W. 196, 275 Mo. 339. From this it might be argued that, since the permission granted under 12 U.S.C.A., Sec. 548, is on its face directed to the question of the taxing of the shares of such banks, an income tax would not thereby be prohibited. This position, however, is not tenable in view of the fact that it has been held that the silence of Congress in failing to grant specific permission to impose other than property taxes is in itself a ban against imposition thereof by the respective states. See *Odland v. Findley*, (D.C. Ohio, 1941) 38 F. Supp. 563, reversed on other grounds, 127 F. (2d) 948.

Furthermore, under the federal rule, a tax on income is construed to be a tax on property, and therefore the decisions of the Missouri Supreme Court must give way to the construction placed on such taxes by the United States Supreme Court, when such decisions relate to a statute of the United States. We quote from *First National Bank v. Buder*, (D. C. Mo., 1925) 8 F. (2d) 883, 46 S. Ct. 557, 271 U. S. 461, 70 L. Ed. 1036:

"As to its own statutory and organic laws, the Supreme Court of Missouri may rule in such wise as to be conclusively binding on a federal court; but it may not say, as is here contended by defendants, what effect a local statute or decision shall have (Pryor v. Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120), when, as here, the question is as to the effect of such a local law or decision on a statute of the United States. If the Income Tax Act of Missouri shall have the effect to put a tax on property, within the purview of the federal decisions on this subject, then the tax in question is a tax on property, regardless of the view which may have been taken by the local state courts as to the nature and effect of such tax. I think it is clear, both upon reason and authority, that a tax upon income is a tax upon the property out of which such income accrued; at least, this is the federal rule (Pollock v. Farmers', etc., Co., 157 U. S. loc. cit. 596, 15 S. Ct. 673, 39 L. Ed. 759), by which alone I am bound here."

CONCLUSION

In the premises, we are of the opinion that national banks are not required to file a return of income under the laws of Missouri relating to taxation of income.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE: Dividends received on national bank stock must be included in gross income for Missouri state income tax purposes.

November 21, 1946

FILED

64

Mr. M. E. Morris, Director
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"It is requested that you please furnish this department with a written opinion, stating whether or not dividends received from National Bank Stock will be subject to Missouri state income tax in either the year 1946 or 1947."

The scheme for the taxation of incomes in Missouri is found as Article 21 of Chapter 74, R. S. Mo. 1939, as amended by House Bill No. 676 of the 63rd General Assembly. As a part thereof, a statutory definition of "income" has been incorporated. This definition is now found as Section 11345 of said House Bill No. 676, which reads, in part, as follows:

"Income shall include gains, profits, and earnings derived from * * * dividends * *"

From the plain wording of the foregoing portion of the statute quoted, dividends are to be included in the gross income of Missouri income taxpayers unless such dividends are exempt under further provisions of law.

Dividends paid on shares of national banking associations are, in effect, profits arising from the operation of a federal governmental instrumentality. As such federal governmental instrumentality, the entire power of the State of Missouri

to impose any taxes which might or could affect the operations thereof is controlled by the action of the Congress. With respect to national banking associations, the Congress has waived the immunity from taxation enjoyed by such instrumentalities through having passed what now appears as 12 U.S.C.A., Sec. 548, which reads, in part, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause." (Emphasis ours.)

Subdivision (c), referred to above, reads as follows:

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income divi-

dends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations." (Emphasis ours.)

By the enactment of House Bill No. 888 of the 63rd General Assembly, the State of Missouri has availed itself of the authorization contained in the above quoted federal statute to impose a tax upon the shares of national banking associations. Section 3 of the bill mentioned reads, in part, as follows:

"A. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, * * *" (Emphasis ours.)

You will note that through election by the State of Missouri to tax national banking associations in accordance with method numbered (4), the provisions of subdivision (c) of the federal statute, set out supra, become applicable. You will further note that the proviso contained in subdivision (c) specifically authorizes the inclusion in the individual income of taxpayers dividends received upon shares in national banking associations, provided two conditions are complied with:

- (1) That the state imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states; and
- (2) That the state also imposes a tax on the income of individuals.

Without specific citation of the numerous statutes relative to the taxation of the income of corporations of the type mentioned, and to the other statutes imposing franchise taxes upon such corporations, we note that the State of Missouri has

complied with the first condition. Again, without specific citation of the statutes relative thereto, we note that the State of Missouri also imposes a tax on the income of individuals, and thereby has complied with the second condition.

We have carefully examined the provisions relating to income which is exempted or may be excluded in computing the income tax of individuals under the Missouri law, and do not find that income of the nature under consideration has been specifically exempted. Further, that to not do so is the intent of the General Assembly may be inferred from the fact that Section 10960, R. S. Mo. 1939, did read as follows:

"That the tax provided in section 10959, R. S. 1939, is hereby declared to be the sole method of taxing national banking associations, their income, shares therein and dividends from such shares."

The tax previously imposed by Section 10959, R. S. Mo. 1939, has been changed to a new method, found in House Bill No. 888 of the 63rd General Assembly. In connection with such election to change the method of taxing the shares of national banking associations, the 63rd General Assembly has also passed House Committee Substitute for House Bill No. 469, which specifically repeals Section 10960, quoted supra. In neither H.C.S.H.B. No. 469 nor House Bill No. 888 has the exemption previously granted by the repealed Section 10960 been retained. We believe that the failure to so retain such exemption statute indicates an intent on the part of the General Assembly to subject dividends received on the shares of national banking associations to the Missouri state income tax, in accordance with the authorization granted in subdivision (c) of 12 U.S.C.A., Sec. 548, quoted supra.

The further condition found in subdivision (c) of 12 U.S.C.A., Sec. 548, that such dividends may be included in the income of individuals, provided that the state also requires the inclusion of dividends received from other corporations, is complied with, we believe, by reason of the fact that Article 21 of Chapter 74, as amended by House Bill No. 676 of the 63rd General Assembly, relating to the taxation of incomes, does require the inclusion of all dividends received from both domestic and foreign corporations. Also, the further requirement in the federal statute that the dividends of national banking associations, if so included in the income of individuals, must not be taxed at a rate higher than that imposed on dividends received from other

corporations, is complied with by the State of Missouri by virtue of the fact that the sliding scale of rates of tax provided under Article 21, Chapter 74, R. S. Mo. 1939, as amended by House Bill No. 676 of the 63rd General Assembly, is applicable to all taxable income, without regard to its source.

One further objection might be advanced against the inclusion of dividends received on shares in national banking associations in the income of individual taxpayers, by reason of the enactment of Section 11350, R. S. Mo. 1939. This statute, in substance, merely authorizes the income received as dividends from domestic or foreign corporations to be reduced proportionately to the tax paid on such earnings from which such dividends arose, upon which an income tax had been paid to the State of Missouri by the corporation as such. In view of the fact that national banking associations are not subject to taxation on their income, this provision works no inequality. It does not impose a tax at a higher rate upon income received as dividends on shares of national banking associations than it does upon income arising from dividends on shares in other domestic or foreign corporations.

The declared purpose of 12 U.S.C.A., Sec. 548, has been repeatedly stated to be that of protecting the capital invested in federal banking associations from discriminatory taxation, and to prevent the fostering of unequal competition with business of national banks by the use of such discriminatory taxation. See *Bedford v. Colorado National Bank of Denver*, 91 P. (2d) 469, followed in 98 P. (2d) 1120, affirmed 60 S. Ct. 800, 310 U. S. 41, 84 L. Ed. 1067; *Mercantile National Bank v. City of New York*, 28 F. 776, affirmed 7 S. Ct. 826, 121 U. S. 138, 30 L. Ed. 895. In the light of this declared purpose, we do not believe that requiring the inclusion in individual incomes of dividends received on shares of national banking associations would be violative of either the spirit or the letter of the federal statute, particularly in view of the specific authorization contained in subdivision (c) thereof.

The reasoning contained in the foregoing is, we think, applicable to the calendar year 1947 and subsequent years.

We note in your letter of inquiry that an opinion is also requested with respect to the calendar year 1946. This presents a somewhat different situation by reason of the fact that the operative date of House Bill No. 888 of the 63rd General Assembly has been fixed by the Legislature as July 1, 1946. This presents a situation in which a state statute will become

operative at a particular time during the tax year and will, by reason of change of method of taxing national banking associations, also make effective the provisions of the Missouri income tax law with respect to dividends received on shares in such banking associations. The questions remain, then: (1) Is it necessary that the Legislature reenact the income tax law to specifically extend its provisions to require the inclusion of such income, and (2) if such legislative action is not required, when will the provisions of the Missouri income tax law become effective?

This precise question was discussed at length in a case arising in Missouri. It is found as *Buder v. First National Bank of St. Louis*, 16 F. (2d) 990. Oddly enough, a somewhat similar situation to that now under consideration had resulted in Missouri by reason of the action of the Legislature in electing to assess an ad valorem tax on the shares of national banking associations. Prior to the Act of the Congress of March 4, 1923, which permitted either the taxation of income received as dividends on shares of national banking associations or an ad valorem tax upon the shares themselves, the only permissible method which states might employ was the latter. This, Missouri had done, and had also in force an income tax law which did not specifically exempt dividends received on shares in such banking associations, although taxation of such dividends was not permissible. After the passage of the Act of March 4, 1923, it was contended that the scope of the Missouri income tax act had thereby been extended to require the inclusion of such dividend income, and since the ad valorem tax on the shares was also still in effect, Missouri had thereby attempted to impose two of the permissible forms of taxation.

In *Buder v. First National Bank*, 8 F. (2d) 883, this contention of the bank had been sustained. On appeal to the Circuit Court of Appeals, 8th Circuit, reported 16 F. (2d) 990, the action of the District Court was reversed and the rule declared with respect to the necessity of reenactment of state statutes and the time when such statutes become effective:

"The question, then, is whether, when Congress by the Act of March 4, 1923, permitted either form of taxation, but not both, the scope of the Income Tax Law of Missouri was thereby enlarged to include dividends upon shares of stock in national banks, so that that law destroyed section 12775 and itself. The lower court was of the opinion that the

act of Congress had that effect, citing the cases of Lionberger v. Rowse, 43 Mo. 67, and In re Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572.

"The first of these cases involved the question as to whether an early Missouri law taxing national banks, which contained provisions subsequently permitted by an act of Congress, could become effective unless re-enacted. The Supreme Court of Missouri, in disposing of the question, says:

"There is no force in the suggestion that, because the state tax law was passed prior to the provisions inserted in the congressional act, therefore it cannot be made to apply, but that a subsequent act must be enacted by the Legislature with direct reference to the law of Congress. If the law on our statute books attains the ends contemplated by the congressional enactment, and is not a violation or infringement thereof, it is of little moment at what particular day it was passed."

"The decision in the case was later affirmed by the Supreme Court (9 Wall. 468, 19 L. Ed. 721), but no reference was made to this question."

The court then discusses the case of In re Rahrer, 140 U. S. 545, in which a similar conclusion was reached, and thereafter the following appears:

"These cases indicate that the courts, in holding that state statutes include subjects not before included because of some congressional restriction or lack of permission, have done so for the purpose of carrying out, and not defeating, their intent and purpose, and to make them more, instead of less, effective. The correct rule, we think, is that, where a state enacts a law, general in its terms and intended to operate upon all subjects within its purview, but not fully effective because of some congressional inhibition or lack of permission, it becomes fully effective, without re-enactment, when that inhibition is so removed or permission

so given by Congress that it can become completely operative without destroying or impairing its effectiveness or defeating the intent of the Legislature which enacted it. * * * (Emphasis ours.)

Applying the rule announced above, although not strictly necessary to the determination of the question there involved, the court further said:

"If, on March 4, 1923, Congress had withdrawn permission for an ad valorem tax on shares of national banks, and had permitted an income tax on dividends, the Income Tax Law of Missouri would, by virtue of the rule referred to, have been expanded to include those dividends, without re-enactment. If Congress had permitted both an ad valorem tax on shares and an income tax on dividends, both laws would, no doubt, have been held to be effective. That would be because of the obvious intention of the state to tax shares as provided in section 12775, and also to tax all income which it could lawfully and effectively reach. * * * (Emphasis ours.)

Applying this to the matter under consideration, we reach the conclusion that upon the operative date of House Bill No. 888 of the 63rd General Assembly, the Missouri income tax act forthwith became effective to include within its scope dividends thereafter received on shares in national banking associations. We, therefore, believe that all of such dividends received subsequent to July 1, 1946, should be included in the return of Missouri income taxpayers for the calendar year 1946.

CONCLUSION

In the premises, we are of the opinion that for the calendar year 1947, and thereafter, dividends received on shares of national banking associations must be included in the gross income of individual taxpayers, and that without regard to whether such shares are in national banking associations located in Missouri or outside this state.

Mr. M. E. Morris - 9

We are further of the opinion that such dividends so received during the calendar year 1946, subsequent to July 1, 1946, must be included in the gross income of individual taxpayers for the calendar year 1946.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

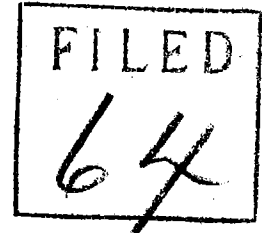
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE:

Refunds of taxes paid under House Bills 868, 869, 888 and 948 of the 63rd General Assembly.



December 5, 1946

12/17

Mr. M. E. Morris
Director of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Please advise this department whether refunds may be made to any tax payers who, endeavoring to comply with House Bills # 868, 869, 888 and 948, inadvertently over pay such tax."

In this opinion we have separately considered the question of refunds under House Bills 868 and 869 and House Bills 888 and 948, for reasons which will appear in the course hereof.

Refunds Under House Bills 868 and 869

It is a general principle applicable to the law of taxation that taxes voluntarily paid may not be recovered by the taxpayer in the absence of statutory authorization to some officer or agency to make such refunds. We direct your attention to 61 C. J., Taxation, page 991, where the rule is declared:

"It is a general rule that taxes voluntarily paid under a mistake of law, with full knowledge of the facts, cannot be recovered back, unless recovery is expressly or impliedly authorized by statute; but the rule does not apply to payment under

protest. Taxes paid under a mistake of fact are recoverable, particularly if made by the revenue officers in the form of a statement to the taxpayer or in taking some official action on the correctness of which the latter has a right to rely, although it is otherwise where the mistake is made by the taxpayer himself, and is the result of his neglect of some legal duty, or where the facts which would have shown the mistake were within his own possession or within his reach."

That the exception to the general rule as stated above, that taxes paid under a mistake of fact are recoverable, has been followed by the Supreme Court of Missouri, appears from *Mathews v. City of Kansas*, 80 Mo. 231, l. c. 236. In this case a taxpayer sought to recover taxes which had been paid upon real property not belonging to him, but which were paid upon certain other real property which the taxpayer had designated as being his. The court therein said:

" * * * It may be conceded that if Harriman had gone to the collector and stated that he had come to pay the tax assessed on plaintiff's land, trusting to the collector to look up the numbers, and this the collector undertook to do, and furnished the wrong numbers, and the agent had thereupon made payment on the belief of the correctness of the lots, this would have been a case of mutual mistake, or at least one in which the plaintiff would have a clear equity of restitution. But the proof here is that without any word or act of the collector inviting thereto, the agent of plaintiff, not depending on the collector for the land assessed against his principal, presented his own prepared list to the collector and told him to make out a receipt for the taxes due upon said list.' In such a case the collector had to look simply to the numbers of the lots thus furnished to ascertain the amount of taxes assessed thereon. * * *"

In that case recovery of the taxes paid was denied.

We take notice that in the administration of the taxation laws contained in House Bills 868, 869, 888 and 948, the infor-

Mr. M. E. Morris - 3

mation relating to the property, its value, yield, etc., is all within the possession of the taxpayer, and that it is solely upon the basis of the figures and information submitted by the taxpayer that the tax is collected. We, therefore, believe that the exception to the general rule with regard to taxes paid under a mistake of fact would be applied to inadvertent overpayments under these circumstances.

We also direct your attention to *State ex rel. v. Lindheimer*, 21 N. E. (2d) 318, 124 A. L. R. 1472, 1. c. 1476, wherein the Supreme Court of Illinois said:

" * * * So, also, any right to a refund or a credit of taxes is purely of statutory origin, and in the absence of an authoritative statute, taxes voluntarily, though erroneously, paid, cannot be recovered, nor even voluntarily refunded by a county, although there may be justice in the claim. *LeFevre v. County of Lee*, 353 Ill 30, 186 NE 536. * * * "

A similar situation was presented in *Mahnomen County v. United States*, 319 U. S. 474, 87 L. Ed. 1527. This was an action on the part of the United States to recover taxes which had been voluntarily paid by an Indian, upon whose lands taxes could not be validly assessed. The Supreme Court of the United States denied such recovery, saying:

"The allottee paid the 1911-21 taxes voluntarily and settled the balance of her taxes to her advantage in 1936. Neither Minnesota law nor federal law requires that a county refund taxes which an emancipated Indian has voluntarily paid. The County is entitled to judgment in its favor."

You will note that throughout these cases reference is made to "statutory authority" to recover such taxes. We have examined the statutes of the State of Missouri generally referring to refunds of taxes paid and find only Section 11215, R. S. Mo. 1939, which conceivably might be applicable. This section reads as follows:

"Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money

had been credited, in favor of the person or persons who paid the same as shown by the collector's books: Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent: Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal levy is either in the county treasury or within the control of the county court: Provided further, that the county court so refunding said money shall specify the time in which said money shall be refunded, and all warrants left on hand after the expiration of such time shall be by said county court canceled, and the money and interest turned into the school fund of the county."

You will note that the above section provides for refunds only under certain special and particular circumstances, and then only when based upon an illegal levy, determined to be such by the Supreme Court of the State of Missouri. We, therefore, think it inapplicable.

There being no statutory authority for refunds, we think the following rule declared in 61 C. J., Taxation, page 974, to be pertinent:

"A state has power to authorize the refund of taxes paid, but the authority to refund must be conferred by a valid and constitutional statute; and the legislature has no power to compel the refund of taxes legally collected. * * * In the absence of a valid statute, no executive or administrative officer has power to refund taxes; and if the power is given to them by law it must be strictly followed. * * *" (Emphasis ours.)

Not finding statutory authority for such refunds either in the taxing statutes themselves, namely, House Bills 868 and 869, nor in the general statutes relating to refunds of taxes, we conclude that the Director of Revenue has no authority to make refunds of taxes voluntarily, inadvertently overpaid thereunder.

Refunds Under House Bills 888 and 948

With respect to overpayments made under these two acts, a different situation presents itself. Your attention is directed to Section 7 of House Bill 888, reading, in part, as follows:

" * * * Upon the filing of such return the full amount of any tax as computed by the taxpayer shall be paid to the Director, who as soon as is practicable thereafter shall examine it and determine the correct amount of the tax. If the Director determines that the taxpayer has paid a tax in excess of the amount lawfully due, the Director shall permit a credit. * * *" (Emphasis ours.)

Also, to the following portion of Section 7 of House Bill 948, reading, in part, as follows:

" * * * Upon the filing of such return the full amount of any tax as computed by the taxpayer shall be paid to the Director, who as soon as is practicable thereafter shall examine it and determine the correct amount of the tax. If the Director determines that the taxpayer has paid a tax in excess of the amount lawfully due, the Director shall per-
mit a credit. * * *" (Emphasis ours.)

Here, then, exists statutory authority for the Director to make the necessary adjustment so that the taxpayer will be required to only pay the amount properly due.

The mechanics by which such "credit" may be made available to the taxpayer have not been set forth in the bills. However, we do note that under both House Bills 888 and 948 the tax is due when the return is filed, and then a determination of the correctness of the total tax computed by the taxpayer is to be made thereafter by the Director of Revenue within such time as is practicable. Therefore, it does not

seem that the "credit" could be directly refunded to the taxpayer. The word credit is defined and explained in 21 C.J.S. 1043 as follows:

"'Credit' has another and more restricted meaning which would narrow it down to a signification nearly synonymous with payment; and, in its narrow or bookkeeping sense, as opposed to 'debits,' may be said to be a payment on account as shown by the creditor's books. In this use, the word has been defined as meaning a payment, an acknowledgment or entry of payment, or of indebtedness reduced; and, as applied specifically to bookkeeping entries, a balance of book accounts in favor of the credit side; anything valuable standing on the creditor side of an account; a sum credited on the books of a company to a person who appears to be entitled to it; that which is entered in an account as an offset to a debt, or for which the party in whose favor the entry is made becomes the creditor of another; * * * * *

This interpretation that the word credit as used in House Bill 888 refers to a bookkeeping entry rather than a cash return is strengthened by the fact that the Legislature did not appropriate any money for the payment of such a "credit."

CONCLUSION

In the premises, we are of the opinion that an overpayment of taxes voluntarily made, under the provisions of House Bills 868, 869, 888 and 948 of the 63rd General Assembly, may not be refunded by the Director of Revenue, but that upon determination by the Director of Revenue that such overpayment has in fact occurred, under House Bills 888 and 948, such excess may form the basis of a valid claim against the State of Missouri, which may be applied against tax liability for subsequent years.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

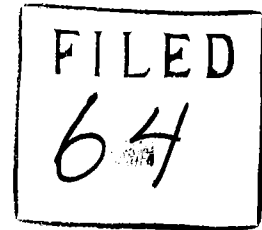
J. E. TAYLOR
Attorney General

WFB:HR

TAXES:
INTANGIBLE TAX:

Political subdivisions to which
intangible tax is distributed.

December 10, 1946



Honorable M. E. Morris, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you
request an official opinion from this department as follows:

"It is requested that you furnish this
department with a written opinion setting
forth what political subdivisions, in
the state of Missouri, will receive
portions of the tax collected under
House Bills Nos. 868, 869, 888 and 948."

Under Section 4 (a) of Article X of the Constitution of
1945, property for the purpose of taxes is classified into
three classes, namely Class 1, real property; Class 2, tangi-
ble personal property; Class 3, intangible personal property.
The taxes deprived under House Bills Nos. 868, 869, 888 and
948 are in Class 3, namely taxes on intangible personal prop-
erty.

Section 14 of H.C.S.H.B. No. 868 requires the Director
of Revenue to return the amount of intangible taxes collected,
less two per cent thereof, to the county treasury of the
county in which the taxpayer is domiciled or in which the
tangible property, subject to tax, had its business situs.
This return of the Director includes a statement of the exact
amount due each political subdivision by applying the local
rates of levy.

Under House Bills Nos. 869, 888 and 948, the Director
of Revenue is required to perform like duties with respect
to the distribution of the taxes on intangible personal prop-
erty collected under those bills. The mode of collection
and distribution of the tax on intangibles is provided for
in Section 4 (c) of Article X of the Constitution of 1945
which reads as follows:

"All taxes on property in Class 3 and its
subclasses, and the tax under any other
form of taxation substituted by the

general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy." (Emphasis ours.)

The answer to your question will depend upon what the term "political subdivisions" includes. Section 15 of Article X of the Constitution of 1945, defining the term "other political subdivisions," is as follows:

"The term 'other political subdivisions', as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." (Emphasis ours.)

It will be noted that under said Section 4 (c) of Article X that the tax is distributed to the counties and other political subdivisions in proportion to the respective local rates of levy. It should also be noted that under the definition of the term "other political subdivisions" as defined in Section 15 of Article X that the term is confined to governmental bodies "having the power to tax."

Having the power to tax raises the question as to what type of tax may be levied and assessed. In other words, is it a tax for governmental purposes or is it a special benefit tax for certain groups or organizations which may be authorized to impose taxes as one of the political subdivisions named in Section 15, supra. It seems that our courts have distinguished between taxes levied under benefit assessments and taxes levied for governmental purposes. The Missouri Supreme Court, in the case of Morrison v. Morey, 146 Mo. 543, l.c. 564, in treating the question of the authority of a levee district to levy taxes for benefit purposes and in distinguishing these levies from levies for taxes for governmental purposes, said:

"But while it is a public subdivision of the State and not a private corporation, it does not follow that the money to be raised from the landowners to carry out the objects intended, is a tax. It is an assessment which is justified by the

benefit, public and private, conferred. The cost of the abatement of nuisances, for the construction of sewers or for the improvement of a street, may be assessed against the property benefited, notwithstanding the public and the owner are both interested. As a tax it would be unconstitutional, because not uniform (Const., sec. 3, art. 10) and because not in proportion to the value of the property (Const., sec. 4, art. 10) and because it is prohibited by the limitations of section 12 of article X of our Constitution, but being an assessment of benefits and in no sense a tax it is a constitutional exercise of the power of the State. * * *

"Assessments for the construction of levees to protect from overflow may be and usually are levied on lands bordering on the stream of water from which the danger is anticipated, and are properly benefits, as contradistinguished from taxes, and laws authorizing them are constitutional.* * *" (Emphasis ours.)

In a recent opinion by the Missouri Supreme court, in the case of Pearson Drainage District v. Erhardt, 196 S.W. (2d) 855, in considering the question of the jurisdiction of that court over a drainage district matter and passing on the question of whether revenue laws were involved, said:

"It is stated in appellant's brief that this court has appellate jurisdiction for the reason the case requires a construction of the revenue laws of this state. We have ruled to the contrary in State ex rel. Broughton v. Oliver, 273 Mo. 537, 201 S.W. 868. In that case and at page 542 of 273 Mo., at page 870 of 201 S.W., we stated:

"When the Constitution speaks of the 'revenue laws of this state,' as it does in section 12 of article 6, supra, it has reference to that body of laws by which funds for public governmental purposes are raised, and not to that law or body of laws by which are authorized the

assessment of benefits to meet the expenses of given improvements. In other words, the two purposes make up separate schemes: (1) revenues for public governmental purposes, and the assessment, collection, and expenditure thereof; and (2) special assessments and their collection and expenditure. It is to the first class supra that the constitutional provision under review applies, and not to the latter.' Chilton v. Drainage District No. 8 of Pemiscot County, 332 Mo. 1173, 61 S.W. 2d 744."

Section I of Article 10 of the Constitution of 1945 provides as follows:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

Applying the principal announced by the Missouri Supreme Court in the Pearson Drainage District case that the Constitution refers to the power to raise revenues for public governmental purposes by assessment and collection, then it would seem that the term "having the power to tax" under the definition of "other political subdivisions" would only include those political subdivisions which have the power to tax for public governmental purposes. Public governmental purposes would consist of taxes for county, municipal and other corporate purposes. Section 11 (b) of the Constitution of 1945 places a limitation on taxes by municipalities, counties, school districts for their respective purposes. Section 11040 of H.C.S.H.B. No. 468 names the taxes which may be assessed, levied and collected for public purposes. It reads as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz: The state tax and taxes necessary to pay the funded or bonded debt of the state, county, township, municipality, road district, or school district, the taxes for current expenditures for counties, township, municipalities, road district and school districts,

including taxes which may be levied for library, hospitals, public health, recreation grounds and museum purposes, as authorized by law."

This section does not seem to contemplate taxes imposed by benefit assessments. The term "power to tax" as defined in Words and Phrases, Per. Ed., Vol. 33, page 162, is as follows:

"The 'power to tax' means the power to take from the citizen a sum for the support of the government, whether that be national, state, or municipal. A power to license is not a power to tax. *Hoefling v. City of San Antonio*, 20 S.W. 85, 87, 85 Tex. 228, 16 L.R.A. 608."

In Vol. 136, A.L.R., page 554, the case of *Altman v. Kilburn et al.*, 116 Pac. (2d) 812, New Mexico Supreme Court, is reported and in this case, at l.c. 560, the court said:

"* * * This court has, in a number of cases, affecting irrigation assessments, distinguished such assessments from taxes. We said in *Lake Arthur D. D. v. Field*, 27 N. M. 183, 199 P. 112, in holding special assessments for such improvements on state lands not to be a tax in violation of Sec. 3 of Art. VIII of the N. M. Constitution: 'Specific assessment on property for improvements, based upon benefits, the cost of which is assessed against the property, is not a tax within the constitutional sense.'"

The court further said at l.c. 561:

"It might clarify somewhat the confusion which appellee senses as having arisen from some language we have used in earlier cases, particularly the case of *State ex rel. Lynch v. District Court of McKinley County*, supra, which we say, as we now do, although in levying these paving assessments the municipality was acting in a governmental capacity nevertheless such assessments are not levied for governmental purposes, and are, therefore, not taxes. The municipality exercises a

governmental function in levying the tax
(for otherwise involuntary payment of
such assessments could not be exacted),
but it is not for a governmental purpose."

It would seem from these cases that the power to tax, as used in the Constitution, means the power to tax for governmental purposes.

Then, following that principal of law, we think the law-makers and the framers of the Constitution, when they defined "other political subdivisions" and included the various political subdivisions in Section 15 of Article X of the Constitution, that they meant such political subdivisions that have "power to tax" for governmental purposes. That being the case, any political subdivision which only imposes a tax for benefit assessments would not be included in the political subdivisions to which the intangible tax would be distributed. The local rates of levy which are to be used by the Director of Revenue in making the distribution of the intangible tax collected under the foregoing acts passed by the 63rd General Assembly are the levies for the ad valorem tax which are imposed on all the real and personal property in the political subdivision. A political subdivision in some cases may be authorized under the law to levy ad valorem taxes on all real and personal property within its boundaries and also to levy benefit assessments. In such cases, only the local rates of levy for the ad valorem taxes, which are imposed on all of the real and personal property in the political subdivision, could be used for the purpose of determining the distributive share of the intangible tax.

From a reading of the debates of the Constitutional Convention on the subject of political subdivisions and of the taxation of intangible personal property, it appears that the writers of the Constitution did not intend to deprive any political subdivision of the benefits of the taxes on intangible personal property which it had been collecting by levy, prior to the adoption of the new Constitution. The debates further reveal that when said Section 15 of Article X of the Constitution of 1945 was being debated that the opinions of the various courts of the states were not in harmony on the question of what subdivisions were included in political subdivisions. For that reason, it seems that the framers of the Constitution attempted to make said Section 15 include all subdivisions which had power to levy a tax. Political subdivisions which only had authority to levy benefit assessments would not be included.

CONCLUSION

From the foregoing, it is the opinion of this department that political subdivisions of the state, which have authority to impose ad valorem taxes on all the real and personal property in the political subdivision, which taxes are derived by a local rate of levy, would be entitled to a distributive share of the intangible tax collected by the Director of Revenue. We are further of the opinion that political subdivisions, which only assess benefit taxes which are not based on a local rate of levy, would not be entitled to a distributive share of the intangible tax based on the levies imposed for benefit taxes. However, if a political subdivision levies both a local rate and a benefit tax, then such political subdivision would be entitled to the portion of the intangible tax on the basis of the local rate of levy which it imposes on all of the real and personal property within its boundaries. From an examination of the statutes, we find the following political subdivisions which are authorized to levy taxes and which would be political subdivisions to which the intangible tax would be distributed: townships, cities, towns or villages, school districts, special road districts, except benefit assessment districts authorized to levy benefit assessments under Section 8720, R. S. Mo. 1939, public water supply districts, Sections 12624 and 12631, R. S. Mo. 1939, sewer districts in certain counties under Sections 12647 and 12649, R. S. Mo. 1939, library tax, Senate Bills Nos. 370 and 160 of the 63rd General Assembly. We further find the following political subdivisions are only authorized to impose benefit assessments in which cases the intangible tax would not be distributed to such division: levee districts organized by circuit courts under Chapter 79, Article 5, R. S. Mo. 1939, in which the tax is levied on the portion of benefits on all lands, railroad property to which benefits are assessed, under Sections 12511, 12535, and 12538 of R. S. Mo. 1939; levy districts formed by county courts under the provisions of Article 8 of Chapter 79 of R. S. Mo. 1939 and especially by the provisions of Sections 12557 and 12565 which are benefited by the improvement authorized under the organization of such levy district. Under Article 11 of Chapter 79, R. S. Mo. 1939, and especially Section 12619 thereof, a tax is authorized to be levied for the purpose of paying tax anticipation warrants issued by drainage or levee districts hereinbefore referred to. Since this tax is in the nature of a benefit tax, the district levying such a tax would not be authorized to demand a portion of the intangible tax when distributed.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney GeneralTYRE W. BURTON
Assistant Attorney General

MISSOURI TRAINING SCHOOL FOR BOYS: Maximum age which boys can be committed to the Missouri Training School for Boys at Boonville, and the use of certified copies of birth certificates as proof of age.

January 2, 1946

FILED

65

Honorable LeRoy Munyon
Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Mr. Munyon:

Replying to your request for an opinion from this office on the questions contained in your letter, which reads as follows:

"Will you please advise me as the superintendent of the Missouri Training School for Boys if there is a maximum age over which a boy may not be sentenced to the Training School? Also if the superintendent of the training school must receive a boy who was over 17 years of age at the time of commitment.

"Will you also please advise me regarding birth certificates furnished by the Bureau of Vital Statistics and their legal evidence of a boy's age? For illustration: we recently received a boy at the Training School who was found by the court to be under 17 years of age but the Bureau of Vital Statistics furnished us with a certificate saying the boy was over 17 years of age. We assume that the finding of the court is conclusive as far as the school is concerned. Are we correct in this assumption?"

Section 8993, R.S. Mo. 1939, reads as follows:

"The institution heretofore known as the 'Missouri Reformatory', located

at Boonville, Missouri, shall continue to be maintained and shall hereafter be designated as the 'Missouri Training School for Boys'; and wherever the words 'Missouri Reformatory' or the words 'Missouri Reform School for Boys', or 'Missouri Training School for Boys' occur in the statutes they shall be held to mean and refer to the 'Missouri Training School for Boys' located at Boonville, Missouri."

Section 8998, R.S. Mo. 1939, referring to persons under seventeen years of age who may be convicted of a crime, in part, reads as follows:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. * * *".

Section 9673, R.S. Mo. 1939, applies to delinquent children under the age of seventeen years in counties having a population of 50,000 or over, and is, in part, as follows:

"This article shall apply to children under the age of seventeen (17) years,

not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children: * * * * *

For the purpose of this article, the words 'neglected child' shall mean any child under the age of seventeen (17) years, who is destitute or homeless, or abandoned, or dependent upon the public for support, or who habitually begs or receives alms, is found living in any house of ill-fame, or with any vicious or disreputable person, or who is suffering from the cruelty or depravity of its parents, or other person in whose care it may be; and any child who while under the age of ten (10) years is found peddling or selling any articles or singing or playing any musical instrument for gain upon the street or giving any public entertainments or accompanies or is used in any aid of any person so doing. The words 'delinquent child' shall include any child under the age of seventeen (17) years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of illrepute; or who knowingly patronizes or visits any policy shop or place where any gaming device is or shall be operated; or who patronizes or visits any saloon or dramhouse where intoxicating liquors are sold; or who patronize or visits any public pool room or bucket shop; or who habitually wanders about the street in the nighttime without being on lawful business or occupation; or who habitually wanders about the streets or roads or public places during school hours without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks, or jumps or who habitually hooks on to any train, or enters any

car or engine without lawful authority, or who is either habitually truant from any day school, or who, while in attendance at any school is incorrigible, vicious or immoral; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any schoolhouse; or who habitually and willfully, and without the consent of its parents, guardian, or other person having legal custody and control of such child, absents itself from home and remains away at night, or loiters and sleeps in alleys, cellars, wagons, buildings, lots or other exposed places. Any child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and shall be proceeded against as such in the manner hereinafter provided. * * * * *

(Emphasis ours.)

The Legislature in 1917 enacted a law applicable to all delinquent minors, which was approved April 10, 1917. The Legislature in 1919, by amendment, approved May 30, 1919, changed the age from eighteen years as provided in the section enacted in 1917, to that of seventeen years, which is now the age limit, and that section as amended is the same as Section 9696, R. S. Mo. 1939, which applies to all delinquent minors, and reads as follows:

"Whenever in the state of Missouri any minor of the age of seventeen years or over shall commit any of the acts constituting a delinquent child as defined in the statutes of this state, applicable to children under seventeen years, such minor may be caused to be brought by his or her parents or lawful guardian or by the probation officer or by any person interested in said minor, before a court of record having jurisdiction over misdemeanors, and tried in the same manner as a person charged with the commission of a misdemeanor. Upon the finding of delinquency, the court may proceed to make such order in the case as may seem to be for the best interests of said minor, either by commitment to any public institution or to any private institution willing to receive

such minor, or to the care and custody of any individual willing to care for said minor or said minor may be left in the care of his or her parents or guardian, subject to the supervision of the court under suspended sentence; or the court may proceed to make any other lawful disposition of the case."

Section 9698, R.S. Mo. 1939, applies to delinquent or neglected children in counties having a population of less than 50,000 inhabitants, and reads as follows:

"This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. When jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of this article, until the child shall have attained the age of 21 years. For the purpose of this article, the words 'neglected child' shall mean any child under the age of seventeen years, who is homeless or abandoned, or who habitually begs or receives alms, is found living in any house of illfame, or with any vicious or disreputable person, or who is suffering from depravity of its parents, or other person in whose care it may be. The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill-repute or any place where any gaming device is operated; or any saloon or dramshop where intoxicating liquors are sold; or who is

either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral. Any disposition of any delinquent child under this article, or any evidence given in such cases shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases under this article. The word 'child' or 'children' may mean one or more children, and the word 'parent' or 'parents' may mean one or both parents when consistent with the intent of this article. The word 'association' shall include any corporation which includes in its purpose the care or discipline of children coming within the meaning of this article. The words 'probation officer,' in all sections of this article, defining his powers and duties shall include his deputies."

(Emphasis ours.)

Sections 9688 and 9704, R. S. Mo. 1939, provide that if a child is found to be delinquent, such child may be committed to an institution by the judge of the juvenile court.

In the case of State ex rel. Wells vs. Walker, Circuit Judge, 34 S. W. (2d) 124, 1. c. 129, the Court said:

"In order to set at rest any dispute as to the jurisdiction of the circuit court to entertain a proceeding under the general law where a child is charged while under seventeen years of age with the commission of a crime, the other act of 1927 (page 129) covers any case that might be in doubt, but providing that any petition or application made to any court or judge having general jurisdiction of criminal cases may deny any motion, petition, or application to transfer the case to a court having jurisdiction of delinquent children.

January 2, 1946

An earlier act could not nullify that provision. All these provisions, taken together, contemplate that an information like that under consideration here must first be filed in the circuit court, and, if the person affected desires to have the case conducted under the provisions of the juvenile law, he must file some motion or petition to transfer the case from the circuit court to the juvenile court, so called for 'convenience,' which would merely mean that the defendant must ask the court to conduct the case as provided for a juvenile delinquent and not prosecute him under the general law. The record shows no motion or suggestion to the trial court that the proceedings be so transferred. The court could not then be without jurisdiction to proceed in the case when no proper method has been attempted by relator to have the proceeding transferred. He has no right to have the proceeding dismissed because he is properly and lawfully in court upon the charge under the authority of the provisions quoted. It is the circuit judge who sits and tries the case whether it is tried under the general law or under the juvenile law. As judge of the circuit court, he must determine whether the relator may be prosecuted under the general law. The distinctions which are made are not in the different courts which may have jurisdiction of one prosecuted as a delinquent or as a criminal but in the application of a law in the same court. We could not make the preliminary rule absolute and thus compel the judge to dismiss the case. We could only order him to stop the proceeding under the criminal law."

In the same case the Court further said at l.c.

133:

"It is clear, therefore, that the respondent judge of the circuit court of Howard

January 2, 1946

county has jurisdiction to proceed with this case in the manner contemplated by his order, or jurisdiction to conduct the case against relator as a delinquent child, and whether he may conduct it one way or the other is to be determined by him.

"The provisional rule is therefore discharged."

With Reference to Copies of Birth Certificates:

Section 9771, R.S. Mo. 1939, Annotated, reads as follows:

"All births that occur in the state shall be immediately registered in the districts in which they occur, as hereinafter provided."

Section 9781, R.S. Mo. 1939, the latter portion thereof, makes a certified copy of the birth certificate prima facie evidence of a person's age:

"* * * And any such copy of the record of a birth or death, when properly certified by the State Registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated."

A definition of prima facie evidence is found in 32 C.J.S., Section 1016, page 1040:

"Prima facie evidence is that which, either alone or aided by other facts presumed from those established by the evidence, shows the existence of the fact which it is adduced to prove, unless overcome by counter evidence; evidence which, unexplained or uncontradicted, is sufficient to

maintain the proposition affirmed. Prima facie evidence is sufficient, unless contradicted by other evidence, to establish for all purposes the existence of a fact in issue; that is, it is sufficient to satisfy the burden of proof and to support a verdict in favor of the party by whom it is introduced when not controverted by other evidence. It may be rebutted or contradicted by other evidence, and, unless there is no other controlling evidence and no discrediting circumstances, it is not conclusive and does not require a verdict for the party whose contention it supports."

The Court in the case of Gallup & Co., Inc. vs. Rozier et al, 90 S.E. Rep. 209, l.c. 212, said:

"* * * but it is evidence to be weighed, not necessarily to be accepted as sufficient; that it calls for explanation or rebuttal, not necessarily that it is required; that it may make a case to be decided by the jury, not that it forestalls the verdict. Prima facie evidence, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions. * * *".

In the case of Hente vs. Michie, 151 S.W. (2d) 107, l.c. 108, the Court said:

"Plaintiff's evidence as to the date of his birth seems to be conclusive. We know of no more cogent or convincing proof of the date of a person's

birth than the birth certificate filed and on record with the Bureau of Vital Statistics. This is corroborated by the positive testimony of the plaintiff, the record in the family bible and the church record of his baptism. The admission that he made an affidavit at the time he was married in Cairo, Illinois, August 22, 1931, that he was then twenty-one years of age, is not sufficient to overcome the solemn records to which we have heretofore referred. Moreover, it is a matter of common knowledge that misrepresentations frequently occur when an affidavit as to age is required in order to get a marriage license. The evidence of plaintiff definitely establishes the date of plaintiff's birth and that he was a minor under the age of twenty-one years when the judgment was rendered against him as surety on the bond, July 26, 1935."

In the case of State vs. Spinks, 125 S.W. (2d) 60, 1.c. 65, the Court said:

"Appellant says the age of the prosecutrix was not shown by competent evidence. She testified she was born July 18, 1922. A copy of the record or certificate of her birth on file with the State Board of Health at Jefferson City (State Registrar of Vital Statistics) was introduced showing that she was born July 18, 1922. It was not shown whether or not the copy of the record was certified by the proper officer, but no objection was made to the copy on that ground, the only objection offered being 'because it is not the original.' Appellant's contention seems to be based upon the claimed inadmissibility of the copy of the birth certificate. By Sec. 9052, R.S. 1929, Mo. St. Ann. Sec. 9052, p. 4193, a certificate of birth must be filed with the local registrar (of Vital Statistics) of the district in which the birth occurred,

which certificate, by other sections of the statute, is to be transmitted to the State Registrar. By Sec. 9060 R. S. 1929, Mo. St. Ann., Sec. 9060, p. 4199, copies of such records, certified by the State Registrar are admissible as prima facie evidence of birth or death. As we have said, defendant did not object to the copy on the ground that it was not properly certified. If properly certified the copy was admissible. See *State v. Worden*, 331 Mo. 566, 56 S.W. 2d 595, 598."

(Emphasis ours.)

In the case of *State vs. Shelby*, 62 S.W. (2d) 721, 1.c. 724, the Court said:

"The state introduced in evidence the original birth certificate of the prosecuting witness, which was produced and identified by the assistant state registrar of vital statistics as a permanent record of his office, and of which he was custodian. It is strenuously urged that it was error for the court to admit such birth certificate, for the reason that it appeared from the testimony of the assistant state registrar, as well as from the instrument itself, that the name of the child was not written therein by the attending physician who prepared the certificate, and that the same was written in different ink, by a different hand, and at a time subsequent to the filling in of the other parts of the blank. The evidence strongly tended to show that the name of the child was written in the same handwriting, and with the same ink as the signature of the local registrar. Appellant cites no authorities in support of his contention. The certificate in question is required by statute to be kept and preserved (article 2, chap. 52, Sec. 9040 et seq., R.S. Mo. 1929 (Mo. St. Ann. Sec. 9040 et seq.)). Section 9053, R.S. Mo. 1929 (Mo. St. Ann. Sec. 9053), provides

what the certificate of birth shall contain, and it will be observed that, by paragraph 2 thereof, it is provided: 'If the living child has not yet been named at the date of filing certificate of birth, the space for "full name of child" is to be left blank, to be filled out subsequently by a supplemental report, as hereinafter provided.' Then follows section 9054 (Mo. St. Ann. Sec. 9054), which, in substance, provides that the local registrar shall deliver to the parent of a child whose certificate of birth is presented without the statement of the given name a special blank for the supplemental report of such given name, which shall be filled out and returned to the local registrar as soon as the child shall have been named. It seems to us, under the facts above outlined, and in view of the statute just referred to, the court below, in the absence of evidence to the contrary, might properly have indulged the presumption of right acting and performance of duty by officials charged with the enforcement of the law governing registration of vital statistics with respect to the certificate in question, and admitted it on that ground. But there is another and more compelling reason why the action of the court in admitting the instrument was proper. By section 9060, R.S. Mo. 1929 (Mo. St. Ann. Sec. 9060), it is provided that a properly certified copy of the record of any birth registered under the provisions of article 2, Chapter 52, R.S. Mo. 1929, 'shall be prima facie evidence in all courts and places of the facts therein stated.' In the very recent case of State v. Worden (Mo. Sup.) 56 S.W. (2d) 595, 598, the question of the admissibility of a certified copy of such a certificate in a proceeding of this character was before this court. In an opinion by Judge White, it was held:

January 2, 1946

'Since original (birth) certificates * * * are required by the statute * * * to be permanently kept, such a certificate becomes an official record, which is always admissible in evidence. A copy of a public paper required to be filed, certified by the officer intrusted with its custody, is admissible in evidence if the original is admissible. (Citing cases.)' (Italics ours.) It necessarily follows that the converse of the latter proposition stated is true; that is, if the certified copy is admissible, then certainly the original is likewise admissible. It would be anomalous, indeed, to hold inadmissible an original document, a certified copy of which is by statute made prima facie evidence, and we decline to so hold."

(Emphasis of last sentence ours.)

Conclusion

Therefore, it is the opinion of this department that the maximum age for which a boy can be sentenced for the commission of a crime, to the Missouri Training School for Boys at Boonville, Missouri, is sixteen years, and the maximum age for which a delinquent boy can be sent to the Missouri Training School for Boys at Boonville, is twenty years.

A certified copy of a birth certificate furnished by the Bureau of Vital Statistics is only prima facie evidence of a person's age, and does not take precedence over a person's age established by judgment of the court.

Respectfully submitted,

APPROVED:

GORDON P. WEIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

GPW:lr

PARDON AND PAROLE: Parole can be revoked after expiration date of sentence for violation committed before such date.

FILED

65

January 7, 1946

Mr. LeRoy Munyon, Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

This office is in receipt of your letter asking a question which is hereby answered by an official opinion. Your letter reads as follows:

"George Gray, 9517, 16 years old, was committed to the Missouri Training School for Boys by the Juvenile Court from St. Louis City, January 19, 1943 charged with delinquency, for a term of two years.

"The date of expiration of this sentence was January 25, 1945.

"Gray was paroled January 18, 1944 and taken to the City of St. Louis by the Parole Officer.

"On November 26, 1944 Gray was arrested on a charge of First Degree Robbery.

"On November 27, 1944 a parole violation warrant was lodged against the subject.

"On May 7, 1945 the subject was sentenced to a term of six months in the City Jail, on two terms of six months, to run concurrently.

"By order of the Board of Probation and Parole, the parole of the above

subject was revoked on June 5, 1945, approximately five months after the expiration date of his sentence to the Training School for Boys.

"Gray was returned to the Training School on November 13, 1945.

"QUESTION: Is the Superintendent of the Training School legally required to retain this boy?"

After analyzing the facts set forth in your letter, the principal question involved is can the Board of Probation and Parole cause the return of a person committed to the Missouri Training School for Boys after the expiration date of his sentence for a violation of a parole, when such violation occurred before the expiration date of his term?

Section 9157, R. S. Mo. 1939, sets up the Board of Probation and Parole, prescribes its powers and duties, and reads as follows:

"There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Article. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Parole Board in so far as the Commissioners of that Department and the Intermediate Reformatory Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles, commutations of sentence, and pardons shall be carried on and completed by the Board created in this Article."

Section 9157, supra, was adopted in 1937, and the powers and duties vested in the Board of Commissioners of the Department of Penal Institutions, relative to granting paroles to persons confined in the Missouri Training School for Boys, were transferred to the present Board of Probation and Parole. The powers and duties which were vested in the Board of Commissioners of the Department of Penal Institutions before the transfer were contained in Section 8353, R. S. No. 1929, providing as follows:

"Said board shall have power to permit any person committed to said institution to return to his home and to release him temporarily from confinement in said institution, but not from its control and supervision; but such permit shall be conditioned upon his continued good conduct during the remainder of the term for which he was committed to such institution. Such person shall under rules adopted by said board report to said board from time to time during the term for which he was sent to said institution, and said board shall have power to cause the return of any person to serve the time for which he was committed whenever his conduct during his permit shall make it necessary or proper in the opinion of said board to do so. The superintendent or any other officer of the institution shall have authority to apprehend and return to said institution any person whom the board may direct to be so returned. No parole shall be granted by the court or judge thereof to any person committed by such court to such institution after he shall have been received into the Missouri reformatory."

Section 8353, supra, was repealed in 1939, however the statute was continued in effect by previous reference in Section 9157, supra. Concerning such action, the following is stated in Volume 50, Am. Jur., Sections 38 and 39, page 58:

"Sec. 38. * * * * * When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall

be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect generally is not to revive or continue in force the statute referred to for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made."

"Sec. 39. It is a general rule that when a statute adopts a part or all of another statute, domestic or foreign, general or local, by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time, and does not include subsequent additions or modifications of the adopted statute, where it is not expressly so declared. The subsequent amendment or repeal of the adopted statute is not within the terms of, and has no effect upon, the adopting statute, where the latter statute is not also amended or repealed expressly or by necessary implication. * * * * *

A Missouri case, where the above stated rule was followed, is *Crohn v. Kansas City Home Telephone Co.*, 131 Mo. App. 313, 109 S. W. 1068. The following appears at l.c. 1070:

" * * * * * In *Endlich on Interpretation of Statutes*, Sec. 35, it is said: 'An act adopting by reference the whole or a portion of another statute means the law as existing at the time of adoption, and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. *Sutherland on Statutory Construction*, Sec. 257; 26 *Am. & Eng. Enc. of Law* (2d Ed.) 714; *Postal Tel. Co. v. Railroad* (C. C.) 89 Fed. 190; *Jones v. Dexter*, 8 Fla. 276; *Culver v. People*, 161 Ill. 96, 43 N. E. 812; *Darmstaetter v. Moloney*, 45 Mich. 621, 8 N. W. 574; *Matter of Main Street*

98 N. Y. 454; Commonwealth v. Kendall, 144 Mass. 357, 11 N. E. 425; Gaston v. Lamkin, 115 Mo. 20, 21 S. W. 1100. Further, it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the former), the statute or provision referred to or incorporated becomes a part of the referring or incorporated statute; and, if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute obviously continue in force, so far as they form part of the second enactment.' * * * * *

We have thus shown that the powers of the Board of Probation and Parole, relative to persons committed to the Missouri Training School for Boys, appear in Section 8353, supra, which by reference is a part of Section 9157, supra.

We note that the word "permit" is used in Section 8353, supra, rather than the word "parole." Parole is defined in 46 C. J., Section 6, page 1183, as follows:

"A parole is the conditional release of a convict before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole. * * * * *"

Consequently, by comparing the wording of the statute using the word "permit" with the definition of the word "parole," it appears that the two are synonymous.

In the case at bar it may appear that the subject has already served his sentence, considering the time he was in the school at Boonville with the time he was out on parole,

up until the date his parole was revoked. In this regard the case of Jacobs v. Crawford is cited, 308 Mo. 302, 272 S. W. 931. The Governor had paroled an inmate of the State Penitentiary sentenced for ten years, and after a year and two months from the time the parole was granted it was revoked. The petitioner claimed that such time should be deducted from the remainder of the sentence and with the benefit of the three-fourths rule he was entitled to be discharged. The following is stated at l.c. 932:

"In a very recent case (In the Matter of the Petition of Jasper Nounce for Writ of Habeas Corpus No. 25779, decided February 17, 1925, 269 S.W. 385, and not yet officially reported), where this court had under consideration the effect upon the term of imprisonment of time elapsed while defendant was out under parole by the trial court, we said:

"A parole is a matter of grace or favor to a convicted defendant, and, when he accepts such parole, he does it subject to all the provisions fixed by the statute, and subject to all other conditions which may be imposed upon him by the authority granting such parole, which are not illegal, immoral or impossible of performance. Such, by all the authorities, is the rule where a parole or conditional pardon has been granted by the executive or other constitutional pardoning power, and the rule applies as fully and as reasonably to paroles by trial courts under our statute."

Such being the latest and controlling utterance of this court, and such being our constitutional and statutory provisions, it would appear to be unnecessary to consider the authorities from other states, cited in the suggestions filed by counsel in this case. No statute has been cited which provides that the time during which a convict is at large under a parole by the Governor shall be deducted from his

sentence, in case such parole is revoked; nor is there any statute providing that such time shall not be deducted from such term of imprisonment. The Governor was therefore free to impose his own conditions."

Under Section 8353, supra, there is no provision allowing the period at large to be counted as a part of the sentence after the parole is revoked. The statute specifically provides that when a parole is violated the Board can cause the return of the person to serve the time for which he was committed. This can only mean the remaining time, besides what was actually served.

In Ex parte Mounce, 307 Mo. 40, 269 S. W. 385, the petitioner was sentenced to a term of two years and on the same day sentence was passed the court issued a bench parole. Later, after two years had expired, his parole was revoked. The petitioner contended that the court was without jurisdiction to terminate his parole and cause him to be returned to prison under the sentence and judgment first rendered, because such parole was not terminated within the period of two years fixed by the judgment. The court stated the following at l.c. 387:

"There is no language in the statute relating to judicial paroles which authorizes the conclusion that there is any relation whatever between the time during which a parole may be continued, and the length of the term of imprisonment imposed in the judgment, from the execution of which a defendant may be paroled. * * * * *"

Section 8353, supra, does not require the Board of Probation and Parole to revoke the parole of a person during its term. It does require that the violation under the parole must occur during the term, and when such violation occurs the Board has the power to cause the person to be returned to the Missouri Training School for Boys.

Mr. LeRoy Munyon, Superintendent -8-

Conclusion.

Therefore, it is the opinion of this department that the Board of Probation and Parole has the power to revoke the parole and cause the return of a person who was committed to the Missouri Training School for Boys after the expiration date of his sentence for a violation of a condition of the parole which occurred during the period of his release and before the expiration date of his sentence. The time such person was out on parole cannot be deducted from his sentence, and when the parole is revoked, such person may be compelled to serve out the term which remained unserved at the time the parole was granted. The Superintendent of the Missouri Training School for Boys is legally required to retain the subject in the case at bar.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

PAROLES: Inmates of Missouri Training Schools may be paroled by the Board of Training Schools before serving penitentiary sentence.

September 12, 1946



Honorable Leroy Munyon, Superintendent
Missouri Training School for Boys
Boonville, Missouri

Dear Mr. Munyon:

Your request of recent date for an opinion of this office relative to paroling inmates when their sentences are such that they might extend beyond their majority to a term in the penitentiary has been received, and reads as follows:

"On March 20, 1944, the above mentioned boy, Donald Ervin, was sentenced in the Circuit Court of Cass County, Judge Leslie A. Bruce, presiding, to serve twenty years in the Missouri State Penitentiary on a charge of Second Degree Murder. Due to the fact that on this date the defendant was a minor, fourteen years of age, the sentence was 'commuted to the Missouri Training School for Boys at Boonville, Missouri, on account of the age of said Defendant, who was Fourteen (14) years of Age June 16, 1943, and that the Sheriff of this County shall, without delay, remove and safely convey the said Defendant to the said Training School, there to be kept, confined and treated in the manner directed by law, and the superintendent of said Training School is required to receive and safely keep him, the said Defendant, in the Training School aforesaid, until the said Defendant becomes of age, at which time it is ordered that he then be committed to the Penitentiary of the State of Missouri, there to be kept, confined and treated in the manner directed by law, until the sentence of this Court be complied with, or until the said Defendant shall be otherwise discharged by due course of law.'

"Donald Ervine, 9925 was admitted to this school on April 6, 1944. He will reach his majority on June 16, 1950. According to our merit system, the number of merits required for eligibility for parole on a minority sentence are to be set by the Superintendent. As Superintendent of this school, on July 15, 1945, I set this boy's merits to be earned at 5000. As of August 1, 1946, Donald has earned a total of 7611 merits.

"Will you please advise me as to whether this boy is eligible for a parole or if it is required that he be kept here until he reaches his majority, June 16, 1950?"

Section 7, Article IV, Constitution of Missouri 1945,
provides:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

The Governor, by the Constitution, has the power to change or shorten a sentence imposed upon a person by a court of competent jurisdiction, even to a full pardon, which power is superior to that of a court.

The courts impose such sentences as are authorized and prescribed by the acts of the legislature, made into laws, and by the same token, the board of training schools has the right to make rules and regulations for the management and supervision of the institutions under its direction and to parole. This board likewise is a creature of the legislature, having been created by Section 8992.20, Laws of 1945. This section, 8992.20, Laws of 1945, Mo. R.S.A., June 1946, reads, in part, as follows:

"There is hereby created and established a state board of training schools which shall have charge and control of all training schools and industrial homes for boys and girls of this state: specifically, the training school for boys at Boonville; * *"

The court, in passing judgment and imposing a sentence upon a person, acts in a judiciary capacity, while the execution of that sentence is an administrative act to be performed through, and by, the executive department of our government. The Missouri Training School for Boys at Boonville, Missouri, is an administrative branch of the executive department and, under the authority vested in it by the laws of this state, is charged with the execution of the sentences imposed upon boys committed to its care.

Section 8992.34a, Laws of 1945, Mo. R.S.A., June 1946, p. 190, provides:

"The board of training schools is hereby authorized to release on parole juveniles committed to institutions under its control; to impose conditions upon which such paroles are granted; to revoke and terminate such parole; and to discharge from legal custody. Release on parole shall be in accordance with rules and regulations made a matter of record by said board. Said board is hereby authorized to call upon the state board of probation and parole for pre-parole investigations and for supervision of and assistance to juveniles after their release from training schools. Said board of probation and parole is hereby authorized and it shall be their duty to furnish when requested reasonable services of the character herein indicated."

Section 448, Vol. 15 Am. Jur., p. 108, reads as follows:

"The judgment, though pronounced by the judge, is not his determination, but that of the law, which depends not on the arbitrary opinion of the judge, but on settled and irreversible principles of justice.
* * * * *

In the case of The State of Florida v. Horne, 52 Fla. 125, 1. c. 134-135, the court had this to say:

"Under the statute above quoted, that in all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law, the effective part of the sentence awarded and punishment fixed in the sentence set out above is that the petitioner 'be imprisoned in the State Prison at hard labor for the period of five years.' The period or cycle of time during which he would be required to be imprisoned for the length of time fixed by the court is to be determined by law. The power of the court extends to fixing the punishment, that is the length of time within the given maximum the petitioner shall be imprisoned.
* * * * *

Section 8999, R. S. No. 1939, provides, in part, as follows:

"The governor shall have power to commute the punishment of any male person under twenty-five years of age who may heretofore have been, or may hereafter be sentenced to the penitentiary, whom he may deem suitable to be sent to the Missouri intermediate reformatory, to commitment in said intermediate reformatory for such term as he may think proper, not exceeding the time for which said person may have been or may be sentenced to the penitentiary. * * * * *

This section is cited for the purpose of bringing out the thought that the court, in sentencing a person to one of the penal or correctional institutions in this state, can only name the place of punishment and the time, but the time may be altered by circumstances, under the authority of those who are charged with the execution of the punishment.

The Circuit Court of Cass County, in the instant case, rendered its judgment and sentenced the defendant to twenty years imprisonment. Because of the age of the defendant, this sentence was commuted to a term in the Missouri Training School for Boys at Boonville, Missouri, to be served until he was twenty-one years of age, at which time he was to be transferred to the penitentiary for the remainder of his sentence. Said sentence was to be served as directed "unless sooner discharged by due course of law." The board of training schools, by statute, Section 8992.34a, supra, has the authority to parole from the Missouri Training School for Boys at Boonville, Missouri, inmates committed to its care and to grant such parole upon conditions prescribed by it according to the rules and regulations of the institution.

The inmate in question, by the records, as outlined in your letter, apparently has complied with these requirements to the extent that he has earned this consideration.

That part of the sentence rendered by the court, "unless sooner discharged by due course of law," applies to both institutions named in the sentence and judgment of the court.

The court only fixes the time, and the place in which a sentence is to be served. That part of the sentence designating the penitentiary could only be effective in the event the inmate was still in custody upon arriving at his majority.

Conclusion

Therefore, it is the opinion of this department that a boy confined in the Missouri Training School for Boys at Boonville, Missouri, who has met the requirements of the institution for parole, is entitled to be considered for the same even though his sentence may be for such a term that he could be confined in the State Penitentiary.

Respectfully submitted,

APPROVED:

GORDON P. WEIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

SCHOOL BOARDS: (1). Section 10342A, R. S. Mo. 1939 will operate to re-employ a teacher in the event that its provisions are not complied with. (2) A school board member possessing the deciding vote may not vote for a person within the fourth degree of relationship by reason of Section 10342 R. S. Mo. 1939, nor may his failure to vote be ignored where his silence brings Section 10342A into operation.

April 29, 1946

Mr. Ralph B. Nevins
Prosecuting Attorney
Hermitage, Missouri

5-9
FILED

66

Dear Mr. Nevins:

This will acknowledge receipt of your request for an official opinion, which letter reads:

"An opinion on the following situation would be appreciated:

"The wife of the president of rural school board, was employed by the other two members, in the absence of the president, for the term 1945-1946, and in a recent meeting of this board when the question of whether or not notice should be given the teacher of termination of her employment under Section 10342A, Session Acts of 1943, the husband of the teacher remained silent, while one member voted to give the notice and one voted to retain her"

"Can this teacher continue by reason of the failure of the board to give her notice of termination of her employment?

"Also, did her husband forfeit his office by failing to vote against his wife, or rather in favor of notifying her of termination of her services?"

In answer to your first question, quoted above, we refer you to Section 10342A of the Laws of 1943, page 890, wherein it is provided:

"Except as may be otherwise provided by law, the provisions of Section 10342 relative to the time and manner of employing teachers

shall apply only to their original employment; and their reemployment shall be subject to the regulations hereinafter set forth. It shall be the duty of each and every board having one or more teachers under contract to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms as those provided in the contract of the current fiscal year; and not later than the first day of May of the same year the board shall present to each such teacher not so notified a regular contract the same as if the teacher had been regularly re-employed. Any teacher who shall have been informed of re-election by written notice or tender of a contract shall within fifteen days thereafter present to the employing board a written acceptance or rejection of the employment tendered; and failure of a teacher to present such acceptance within such time shall constitute a rejection of the board's offer. Any contract given a teacher may be terminated at any time by mutual consent of the teacher and the board. When the board of directors of any school district deems it advisable to close the school and send the pupils elsewhere rather than employ a teacher, said board of directors shall have power to terminate any contract continued under the provisions of this section by giving the teacher written notice of such termination not later than the first day of July next following the teacher's re-employment.

"Approved April 23, 1943."

Under the rules for statutory construction, or the application of a particular statute to a set of facts, the general rule is to give effect to the legislature's intent. (See *State v. Naylor*, 40 S.W.(2d) 1078, 328 Mo. 335; and *Key* 190 Mo. Digest Statutes, Vol. 26.) Further, where a statute is plain and unambiguous there is no room for construction, but the language must be given effect. (See *Fitchner v. Mohr*, 165 S. W. (2d)

Under the statute quoted, supra, and under the rules cited, supra, it appears that one requirement of the statute is that the board of education must "notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment." In the present instance the teacher hired by the board for the 1945-1946 term was not given written notice of re-employment on or before the fifteenth day of April. It would appear that the failure to give the notice required by the statute would bring about the re-employment of the teacher in accordance with the statute, on the same basis as the contract for the 1945-1946 term provided, if there is nothing which would render such re-employment invalid.

However, when we keep in mind that Section 10342, R. S. Mo., 1939, prohibits the casting of the deciding vote by a member of the school board for the employment of any one within the prohibited degree of relationship, the question arises as to whether or not the present contract is a valid one, and one under which the teacher may act and be compensated therefor. In 13 Corpus Juris 421, Section 352, we find the following statement:

"Frequently a statute imposes a penalty for the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for the doing of such a penalized act is void. In accordance with the view of Lord Holt in an old case: 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho there are no prohibitory words in the statute'. * * * * And it would seem that in all cases the true rule is one of legislative intent, and that the courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; * * * *."

We call your attention to the last sentence of the above quotation.

The Nepotism Act, Section 6, Article VII, of the Missouri Constitution, 1945, *infra*, seeks to prevent the establishment of a contract, such as might be believed to have been established by reason of Section 10342A, R.S. Mo. 1939, in this case.

In the case of *Haggerty v. Ice Manufacturing and Storage Company*, 143 Mo. 238, the court considered a civil suit for damages for the failure of the defendant to properly keep in cold storage during the closed season wild game deposited with the defendant by the plaintiff for storage. The defendant took the position that the contract contemplated the commission of a misdemeanor in that under the Food and Game Laws of the State it was a misdemeanor for any person to take or have in his possession such wild game during the closed season. The court at page 247 concluded as follows:

"Recurring to the petition, it shows on its face that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. * * * * The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process."

The principle laid down in the above quotation, we believe, is applicable to the situation here presented for answer. In other words we believe that this contract of re-employment is a void contract in the light of the law. To hold that this is a valid contract, entitling the teacher to re-employment and compensation for said employment, would be to nullify the purpose of Section 6, Article VII, Mo. Const., 1945, and the intent of the Legislature, as evidenced in Section 10342, Mo. R.S. 1939, which prohibits the casting of the deciding vote for one within the prohibited degree of relationship.

In the Constitution of Missouri, 1945, Article VII, Section 6, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

This section, in principle, is also found in the Constitution of 1875, Article XIV, Section 13. That section was held to be self-enforcing, *State v. Ellis*, 355 Mo. 154, 28 S.W.(2d) 363, and while the new section in the Constitution of 1945 has not been passed upon, undoubtedly under the holding of the *Ellis* case, *supra*, the court would hold that Section 6 of Article VII of the present

Constitution would be self-enforcing. With the above quoted section of the Constitution in mind we proceed to a discussion of your second question.

The second question, asked by your letter, concerns the forfeiture of office by the president of the school board and involves the duty of a member of the school board to act or the failure of said member to act. Section 10342, R.S. Mo. 1939, provides:

"* * *The board shall not employ one of its members as a teacher; not shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; * * *"

Under the facts of the present case, the three members of the school board, by their failure to reach a decision, brought about the re-employment of the teacher under Section 10342A, supra. As your letter shows, the deciding vote rested with the president of the school board who was required by Section 10342 to cast a negative vote, or, in other words, he was required to vote for giving the teacher notice of termination of her employment. Section 10342, R. S. Mo., 1939. Under the facts of your case the president of the school board could not have voted to retain the teacher without violating Section 10342, supra. The silence of a member of the school board is construed as voting with the majority. In the case of *Bonsack v. Pearce, Inc., etc.*, 49 S.W. (2d) 1085, 1.c. 1088, the general rule is stated:

"(2) Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them. If under such circumstances, a member does not respond when his vote is called for, but sits silently by when given an opportunity to vote, he is regarded as acquiescing in, rather than opposing, the measure, and is regarded in law as voting with the majority. Such is the rule announced in many authorities. *Montgomery v. Claybrooks*, 213 Ky. 493, 281 S.W. 469; *Ray v. Armstrong*, 140 Ky. 800, 131 S.W. 1039, loc. cit. 1049, and cases cited; *City of Springfield v. Haydon*, 216 Ky. 483, 288 S.W. 337, 341; *State ex rel. Young v. Yates*, 19 Mont. 239, 47 P. 1004, 37 L.R.A. 203; *Rushville Gas. Co. v. Rushville*, 121 Ind. 206, 23 N.E. 72, 6 L.R.A. 315, 13 Am. St. Rep. 388; *Jensen v. School District*, 160 Minn. 233, 199 N.W. 911."

However, in the present instance there was no majority. Under the facts, one member of the school board voted for retention of the teacher and one voted for the termination of the teacher's employment. Therefore, the deciding vote was within the power of the president of the school board, but, by the authority of Section

10342, supra, he was prohibited from casting an affirmative vote in favor of retaining the teacher. The only vote, under the present facts, that he could cast was a vote to give notice of termination of the teacher's employment. The question then becomes what was the effect of this failure, on his part, to vote in favor of terminating the teacher's employment as required by the statutes. The president of the school board is charged with knowledge of the law. Being so charged he knew that if he possessed the deciding vote, as he did under the present facts, he could not violate Section 10342 and vote for retaining the teacher, and further, he is charged with knowing that, by virtue of Section 10342A, his failure to vote would bring about the operation of the statute, Section 10342A, supra, and that the teacher would thereby be retained. In the case of State v. Whittle, 63 S. W. (2d) 100, 1.c. 101, the following quotation is found:

"* * *The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment.* * *"

The Whittle case is discussed and considered in the later case of State v. Becker, 81 S. W.(2d) 948, 1.c. 950, where the court said:

"We are of the opinion that the reason of decision, as it appears in the quotation given, and as stated in the provision itself, does not support relator's position. The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. The only correlation expressed or implied is a specific kinship existing between two individuals, specifically indicated, and none other. No implication may properly be drawn from what has just

been said that one clothed with a power of selection or appointment might not through connivance or confederation with his associates who share in such power bring himself within said prohibition. Such is not the present case. Nor have we any call to consider in what circumstances one who acts in connivance in bringing about the appointment of a relative of an associate of his in the exercise of the power of appointment will suffer penalty as for violation of said provision."

The Becker case, supra, may be construed as limiting the Whittle case, supra, by its requirement of "action, direct or indirect, not inaction is prohibited." At first examination it appears that the present set of facts constitute a case of "inaction", and that therefore the president of the school board by his "inaction", did not have any relation to the subsequent employment of the teacher by virtue of Section 10342A's operation. But, when it is remembered that the president of the school board is charged with knowledge of the law, and therefore he knew that by not voting, the teacher would be re-employed by operation of said statute, his failure to vote was such a course of conduct as to bring about the re-employment of the teacher, who was related to him within the fourth degree of affinity (State v. Ellis, supra,) a result he was charged with knowing that he could not procure, by an affirmative vote, under the present facts, by prohibition of Section 10342, supra. In other words, the president of the school board accomplished, by his silence, that which the law prohibits him from doing by a positive action.

It is pertinent to note that the Becker case, supra, was concerned with a set of facts that are distinguishable from those in the present case. In the Becker case the vote of the relative would not have been effectual if cast negatively and would not have done anything but add to the already present majority if cast affirmatively. However, in the present case the president of the school board could do one of three things. First, he could vote to terminate the employment of the teacher, which would have been an effective vote and would have prevented the re-employment of the teacher. Secondly, he could have voted to retain the teacher, but such vote would have violated Section 10342 and would have been illegal. Or, thirdly, he could remain silent, as he did, and procure the re-employment of the teacher by operation of statute, Section 10342A, R. S. Mo. 1939. In the Becker case, the vote of the relative would not

have been an effective vote regardless of how cast, while in the present instance the president of the school board obtained by his silence, that which he could not have obtained by his vote. The conduct of the president of the school board, in the present case, his failure to vote with full knowledge that such failure to vote would bring about the re-employment of the teacher and his further knowledge of his relationship to the teacher, was such conduct as to violate Section 6 of Article VII, Missouri Constitution, supra.

The Whittle case, supra, holds that a school director is a public officer within the meaning of said section of the Constitution (1875).

CONCLUSION

Under the facts of the present case, and the law we deem applicable, it follows that, first, if any contract arose by reason of the operation of Section 10342A, said contract would be void and contrary to the purpose of the Nepotism Act, and violative of the intent of the Legislature, as expressed in Section 10342, Mo. R.S. 1939, and second, that the president of the school board violated Article VII, Section, Missouri Constitution, 1945, and thereby forfeited his office. Ouster proceedings may be instituted to remove the president of the school board from office.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:dc

SHERIFFS:

Sheriffs may personally claim per diem attendance for two courts on the same day providing he can execute the requests or duties imposed upon him by each court.

July 1, 1946

FILED

66

Honorable Ralph B. Nevins
Prosecuting Attorney
Hermitage, Missouri

Dear Mr. Nevins:

We received your opinion request and a letter of explanation, from which we quote your question:

"May a Sheriff collect per diem for attendance upon Circuit Court and Probate Court on the same day when the courts are held on different floors of the same building, and at the same time?"

As we understand your question, there are at least two factual circumstances that may arise under it. The first one could be, where the sheriff attended both courts on the same day and executed the duties as required. Examining the quotation from Corpus Juris, infra, we see that it is not absolutely necessary that a sheriff be in constant attendance upon the court. The second possibility your question presents, is where the sheriff's services are in such demand by one court as to preclude his attendance upon the other court.

In considering these two possibilities, we will begin with the second one, for it is the most easily disposed of. Under three previous opinions of this office, we have ruled that the attendance by a sheriff or deputy must be actual attendance, that is, real physical presence in order for the sheriff or deputy to collect the per diem fee. In the second possibility outlined above, if the sheriff's duties in one court are so strenuous and demanding that in order to execute them, he would be denied the opportunity to perform any duty placed upon him by the second court, it is obvious that the sheriff personally could have no claim against the second for per diem. Section 13411, R. S. Mo. 1939, provides for such a contingency by allowing the sheriff to appoint a deputy, and from the terminology of the statute, we believe it possible to infer that actual attendance is required. The pertinent

parts of said section are as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00"

If the second situation outlined above is the situation about which you ask, we believe that a sheriff cannot personally put in a claim for attendance on both courts, where he is unable to attend to and execute the duties imposed upon him by one court due to the demands of another court. In Corpus Juris, Vol. 57, Section 1177, the attendance at court in general is discussed as follows:

"A sheriff, deputy sheriff, or constable is entitled, as a matter of right, to compensation for attending court when, and only when, compensation is provided by statute. It has been held, however, that where the statute imposes upon the sheriff the duty of attending court if required by the judge, but provides no fees for such attendance, it is within the power of the board of county auditors to allow reasonable compensation therefor. Where a fee is provided only for attending certain courts, the sheriff cannot claim such fee for attending other courts; in order to entitle a sheriff to compensation for attendance at court, his attendance must have been required; a constable is entitled to fees for attendance on the sitting of a court only when the court was actually sitting; and, under a statute allowing constables a fee for attending each trial in a criminal case, a constable is not entitled to such fee where there was a plea of guilty, and judgment thereon, and no evidence was introduced.

"A sheriff is not entitled to fees for a mere nominal, colorable, or constructive attendance at court; but he is entitled to a fee for attendance, although he may have been absent from the court room several times during the hearing of a case, where it appears that he was within calling distance all the time ready to respond to any request, direction, or order

made to or upon him by the court or counsel; and a constable who was summoned, actually attended court, and was ready to perform his duties as a constable if called on, is entitled to his fees, although he did not actually perform any of the duties of a constable."

Several situations are ruled upon there, but we would like to point out especially the underlined portion of the above quotation. Regarding double compensation, Section 1178 provides as follows:

"Where the fee bill authorizes the sheriff to charge a certain amount for one day's attendance upon the court, he cannot charge an additional sum for attendance at a night session; where the statute allows the sheriff a certain per diem for attendance by himself or deputy, he cannot recover pay for two deputies attending the court; it is not proper for both the sheriff and his deputy to claim per diem or other compensation for attendance on the same court, at least where the attendance of one officer only is required; and a constable cannot recover the salary of a sergeant at arms for attending the sessions of a court where the salary has been received by a regularly appointed sergeant at arms; but where there are two judges holding court at the same time in the county, and it is the duty of the sheriff to attend upon each, he is entitled to an allowance for attendance before each judge; and where a statute gives the sheriff a per diem for attendance on a circuit or municipal court, and the same statute also contains a provision allowing him a certain amount per day for attending any court or officer with a prisoner, a sheriff is not precluded from recovering the fee for attending a municipal court with a prisoner by the fact that he has charged and received his per diem for attending on the same court on the same days."

The underlined portion of Section 1178 quoted, supra, seems to indicate that the sheriff would be entitled to claim an allowance for attendance before each court where it is the duty of the sheriff to attend upon each, even though they are in session at the same time. However, the case of Lasalle County

v. Milligan, 143 Illinois 321, 32 N. E. 196, which is cited as authority for the underlined portion of Section 1178, supra, actually holds that a sheriff may make a claim upon both courts, where two are in session at the same time and it is his duty to attend upon both, but that his making of a claim by way of a deputy is not a personal claim but a claim of the office of the sheriff.

In regard to the first possibility referred to above, where a sheriff attended both courts on the same day and executed the duties as required, we believe such a course of conduct is possible, and under such course of conduct it would be possible for the sheriff to make a personal claim against each court for an allowance, but please keep in mind that such a situation is factual. For example, under your question, if the circuit court was in session on the second floor and the probate court was in session on the first floor and the duties demanded by the circuit court did not conflict with, or preclude the execution of the duties of the other court thereby not requiring the constant physical presence of the sheriff in each court at the same time, the sheriff could attend upon both courts in such a manner as to be entitled to the allowance by both courts. Under our quotation of Section 1177, supra, it is seen that a sheriff is entitled to a fee for attendance although he may have been absent from the court room several times during the hearing of a case, but it appeared that he was within calling distance at all times and was ready to respond to any request, direction or order made to, or upon him by the court or counsel. Undoubtedly the better rule would be to require the actual physical presence of either the sheriff or a deputy in each court at the same time, and allow the sheriff to claim personally upon the court he actually attends, and the office of the sheriff to claim through the deputy for the court the deputy attends, as under the Milligan case referred to, supra. The discussion of the first possibility referred to above is considered because we could find no direct prohibition against such a situation.

Further, we direct your attention to Section 2034, R. S. Mo. 1939, which made it the duty of the sheriff to attend courts under the general law. Subsequently, however, said section was amended to read as follows:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be

the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

This amendment of said section relieves the sheriff of the duty to attend court unless specifically directed by the court to so attend. With this in mind there could be no claim for per diem unless the court had directed the sheriff to attend upon said court, or unless under the general law it was the duty of the sheriff to attend upon said court.

CONCLUSION

Therefore, it is our conclusion that a sheriff may personally claim an allowance for attendance upon two courts which are in session at the same time, providing he can execute the duties, requests or orders imposed upon him by said courts with no derogation of each to the other. In the event that the duties imposed upon the sheriff by one court are such as to preclude him from attending a second court at the same time, the statute contemplates such a situation and provides for the appointment of a deputy, said deputy then claims an allowance for the office of the sheriff, but the sheriff is not personally entitled to claim. However, before any per diem may be claimed by the sheriff or his office, the attendance upon court must be directed by the court or imposed upon the sheriff by the general law.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

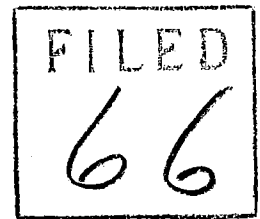
J. E. TAYLOR
Attorney General

WCB:DC

LEGISLATURE: Resignation of Senator during recess of
RESIGNATION Legislature should be directed to the
OF Governor.
SENATOR:

November 18, 1946

11/25



Honorable Milton F. Napier
1200-706 Chestnut Street
St. Louis 1, Missouri

Dear Senator Napier:

Your letter of recent date, requesting an opinion of this department, reads as follows:

"I have a problem, and I need your advice. After the death of Senator Clyde Wagner, I was elected to fill the vacancy thus created in the 29th Senatorial District. Upon redistricting here by the St. Louis Board of Election Commissioners, I found myself in the new 2nd Senatorial District. On November 5th, last, I was elected for a four-year term as State Senator from that District. The question which vexes me now is concerning my resignation from the old 29th. Should my resignation be tendered to the Governor or to the presiding officer of the Senate? I expect to qualify as Senator from the new 2nd District when the legislature convenes on January 7, next. If possible, I would like to take a short vacation, beginning not later than December 15th, so would greatly appreciate it if you could let me have your opinion at your earliest convenience."

The question presented in your letter is, to whom should a Senator tender his resignation during recess of Legislature?

Section 12858, R. S. Mo. 1939, reads as follows:

"If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any such member shall resign during any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the journal; in which case, and in all cases of vacancies happening, or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the governor thereof."

(Emphasis ours.)

That part of Section 12858, supra, as emphasized is self-explanatory and further search of the Laws of Missouri does not disclose any change in the method provided in this section for tendering resignations by members of the Legislature.

Conclusion

Therefore, it is the opinion of this department that when a member of the Legislature desires to tender his resignation during recess thereof, the same should be addressed to the Governor.

Respectfully submitted,

APPROVED:

GORDON P. WEIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

GPW:CP

SCHOOLS: County court where indigent parents reside must furnish expenses of child in School for the Deaf.

March 7, 1948

FILED

67

Honorable Louis Bolte, Comptroller
City of St. Louis
Department of Finance
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an official opinion from this office on the following question:

"I would appreciate an opinion from you on the responsibility of a County which has sent a child to the School for the Deaf and later, the child's parents change their residency within the State of Missouri. Does the original committing County assume continuous responsibility for the teaching of the child regardless of change of residency of the parents in Missouri, assuming of course that the parents cannot pay for the care and teaching."

Article 25, Chapter 72, R. S. Mo. 1939, provides for the education of blind and deaf persons who are residents of this state.

Section 10854 of said Article requires the parents or other persons having custody or control of deaf children between the ages of six and seventeen years to cause such children to attend regularly some recognized school for the deaf.

Section 10856, R. S. Mo. 1939, provides for the payment of the expenses of such education where the parents or guardians of the children referred to in the previous paragraph are unable to pay for their education. That section is as follows:

"Whenever, upon petition of any person, and satisfactory evidence adduced to the county

court of this state that there is a blind or deaf person residing in any county, and such person is entitled to the advantages of the Missouri school for the blind or the Missouri school for the deaf, and the parents or guardians of such persons are unable to pay the expenses of such person at his proper school, the county court shall order him or her sent to the proper school, at the expense of the county for his clothing and traveling expenses."

While the language in the above section is somewhat indefinite in that it refers to "the county court of this state" and a "deaf person residing in any county," it is obvious from a consideration of the entire section that it was intended that the county court of the county in which the individual involved has his residence has the legal duty of sending a deaf person within the statutory age limits to the Missouri School for the Deaf.

Further confirmation of this view may be obtained by a consideration of Section 10861 of the same Article pertaining to schools for the blind and deaf. That section requires that money to assist blind students be paid out of the general revenue funds upon an account verified by the president of the institution, "accompanied by a certificate from the county of which said blind pupils are residents."

In your request you ask whether the change of residence of the parents of a deaf child of the proper school age, and the expense of whose education must be borne by a county court, affects the liability of the county court of the original county of residence for such educational expense.

There are numerous decisions of the courts of this state in which the question of the residence of a minor is involved and, without exception, these have followed the rule set forth in *Lacy v. Williams*, 27 Mo. 280, 1. c. 282:

"Regularly, the domicile of the parents is that of their children, and whilst the mother was a resident of Cedar county, a curator for her children could not be appointed by the County Court of Polk county. This is the only safe rule, and the only one that will prevent confusion and conflict in the administration of the estates of minors."

Honorable Louis Nolte - 3

As stated in the above quotation, a variance from this rule would result in endless confusion in the administration of the affairs of the various counties by the county courts.

CONCLUSION

It is, therefore, the conclusion of this office that the county court of the county of which a deaf child of an age at which he is subject to compulsory school attendance laws is a resident is required to furnish the necessary expenses of said child at the Missouri School for the Deaf, where the parents of such child are financially unable to furnish such expenses, and it is our further conclusion that the residence of such child is the residence of his parents.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

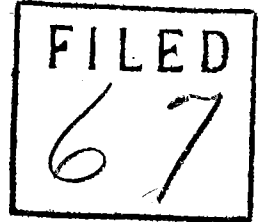
APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

COUNTY COURTS: County courts have jurisdiction to entertain proceedings for establishment and vacation of public roads.

September 18, 1946



120
Honorable Wayne Horman
Prosecuting Attorney
Unionville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a request for an opinion from this department, which request reads as follows:

"Will you kindly give me an opinion on the following?

"Which court now has jurisdiction over establishing or vacating public roads.

"If it is the Circuit Court, would the same procedure be followed as when the jurisdiction was in the County Courts?

"I have done considerable work on this matter but have found little or nothing on the point other than that I am of the opinion that jurisdiction of the matter was taken from the County Courts."

The duties of the county courts with respect to establishing and vacating public roads are set out in Article I, Chapter 46, R. S. Mo. 1939. Since the procedure for establishing and vacating a public road is similar, we will deal with the sections of the statute relating to the establishment of a public road. Under Section 8473, R. S. Mo. 1939, the petition for the establishment of a public road, after having been signed by the necessary number of signers, is presented to the county court. This petition contains information relative to persons owning the lands through which the road passes, the amount of damage claimed,

and other matters which are not pertinent to the question here. After having made proof of proper notice of the intention to file the petition, the county court has jurisdiction to entertain the petition. If a remonstrance to the proposal has been filed in due time, the county court considers the remonstrance along with the petition. The county court, in its duties in connection with the establishment of such road, passes upon the question of the public necessity of the road, the expense of the establishment and building it, the amount of damages claimed by the owners of the land, and the practicability and probable damages, if any, that are claimed. Then, if the court, upon the hearing, finds the facts do not justify the establishment of the road, the petition is denied. On the other hand, if it finds facts to justify the establishment of the road, orders are made by the county court accordingly. In this connection, the county court makes a finding whether or not it is necessary to establish the road at the expense of the county or at the expense of the petitioners, or both. After the court makes this finding, it directs the county highway engineer to view, mark out and survey the road, and obtain other information as to relinquishments and claims of landowners through whose land the road passes. The engineer is also directed to obtain a description by section and subdivision of the lands of each owner sought to be taken, and also to estimate the cost of bridges, culverts and grading that may be necessary on such road. Then the law requires that all deeds and plats to such road be filed by the highway engineer in the office of the county clerk and preserved as public records. The deeds are recorded in the office of the recorder of deeds.

Under Section 8476, R. S. Mo. 1939, if the landowners fail to agree on the amount of damages that they have sustained on account of taking of such road, and they fail to relinquish the right of way, and the county court finds that the road is of such great public utility as to warrant the establishment of the same, then the court appoints commissioners to view and assess damages. These commissioners, after having performed their duties as such, make their report back to the county court. If exceptions are taken to the commissioners' report, then the matter goes to the circuit court, where it may be heard before a jury.

Under Section 8478, R. S. Mo. 1939, if no exceptions to the commissioners' report are filed, the county court retains jurisdiction, and, if payment of damages is made in accordance with the report of the commissioners, the court orders the road established. This order and the report of the highway engineer are recorded by the clerk of the county court in a book to be provided and kept for that purpose.

The foregoing duties relative to the establishment of a public road were delegated to the county court by the Legislature. The question here is whether or not, under the new Constitution, the county court still retains jurisdiction to establish or vacate public roads. The question is raised because of the fact that, under Section 1 of Article V of the Constitution of 1945, the judicial power of the state is vested in the supreme court, courts of appeals, circuit courts, probate courts, St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts. The source of this section was Section 1, Article VI, of the Constitution of 1875, and that section included "county courts." This section of the Constitution confers judicial power or jurisdiction on the courts named in that section. In Volume 21, C. J. S., page 188, Section 124, we find the rule in such cases to be stated as follows:

"The judicial power or jurisdiction conferred on certain courts by some constitutional provisions is exclusive in the sense that the grant thereof precludes the legislature from creating any other courts, or from conferring any additional jurisdiction on such courts, or from conferring all or a part of such courts' jurisdiction on other courts. Thus, unless the constitution provides for other courts, the specification therein of courts which may exercise judicial power operates as a limitation of the legislature's power to create other courts. * * * "

The Constitution does not distinguish between judicial powers and quasi judicial powers, and since the duties of the county court with respect to the establishment and vacation of public roads are both administrative or executive and judicial or quasi judicial, we look to the transcript of the debates of the Constitutional Convention for some information as to the intent. While this information is of comparatively limited value, it seems that our Supreme Court in *State ex rel. v. Osburn*, 147 S. W. (2d) 1065, has referred to debates of the Constitutional Convention for aid in the construction of the provisions of the Constitution. The same principle was applied in *State ex rel. Montgomery et al. v. Nordberg*, 193 S. W. (2d) 10.

In the debates we find that Mr. Bradshaw, who was handling this provision of the Constitution before the Convention, made

statements to this effect, pages 1688 et seq.: "The committee did not wish, of course, to interfere with the proper administration of the activities of the county." "I think Senator Phillips was correct that the committee had in mind excepting judicial functions to except what are generally accepted as the truly judicial functions going with a court of record." "Road matters are a part of the county business." Further referring to the debates on this provision of the Constitution, we find that no delegate questioned the correctness of his interpretation of this provision of the Constitution.

By Section 7, Article VI, of the Constitution of 1945, provision was made for a county court, and its duties were proscribed. This section reads as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

The source of this section was Section 36 of Article VI of the Constitution of 1875. The principal difference between the new section and the old section is that, under the Constitution of 1875, county courts were "courts of record" and they were authorized to transact "such other business as may be prescribed by law." It will be noted, however, that this section requires the court to "keep an accurate record of its proceedings."

In speaking of the powers of the county court, under the clause of said Section 36 of Article VI of the 1875 Constitution relating to county business, the Missouri Supreme Court, in *State v. Corneli*, 347 Mo. 1164, 182 S. W. (2d) 83, 85 (6,7), said:

"We concede that the county court is created as a court of record and its jurisdiction partially fixed by the constitution. Section 36 of Article VI of the Missouri Constitution Mo. St. Ann. vests such court with 'jurisdiction to transact all county and such other business as may be prescribed by law.' But the authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal

affairs of the county, such courts possess no powers except those conferred by statute. State ex rel. v. Redman, 270 Mo. 465, 194 S. W. 260; State ex rel. v. Oliver, 202 Mo. App. 527, 208 S. W. 112."

If the duties of the county court with respect to establishment and vacation of public roads are purely judicial, then the foregoing provisions of the statutes relating to the establishment and vacation of public roads under Section 2 of the Schedule of the Constitution of 1945, would be ineffective after July 1, 1946.

Section 1 of Article II of the Constitution of 1945, which is the same as Article III of the Constitution of 1875, provides as follows:

"The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

From a reading of the opinions of the courts relative to the division of powers, we find that the courts have held that it is not always easy to distinguish between the powers and duties of the various branches of our government. In the case of Rhodes v. Bell, 230 Mo. 138, l. c. 152, we find the following statement of the Missouri Supreme Court, through Hough, J.:

"* * * * 'It is not always easy to distinguish between the powers and duties which may, and those which may not, be assigned by the Legislature to the several departments among which the Constitution requires the distribution of the powers of government to be made. This difficulty has given rise to much litigation, and has induced the courts to adopt very liberal views in determining where any power not easily classified may be properly lodged. In State v. Harmon, 31 Ohio St. 250, it was

said: "Whether power in a given instance ought to be assigned to the judicial department, is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may appropriately be assigned to either of the departments." Judge Cooley, in his work on constitutional limitations, speaking of the division of the powers of government, says:

"If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed." * * * "

With this principle in mind, we will attempt to analyze the duties of the county court with respect to establishment of public roads and determine which are judicial, quasi judicial, and which are administrative or executive.

Many of the boards and bureaus of this state perform quasi judicial functions, and those powers seem to be recognized under the Constitution. Section 22 of Article V of the Constitution of 1945 provides as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

Therefore, it would appear from this section that the framers of the new Constitution and the people who adopted it recognized the fact that an administrative officer, or body existing under

the Constitution or by law, would perform judicial or quasi-judicial functions which affect private rights. This provision of the Constitution would also indicate that the rule announced in the case of Rhodes v. Bell, supra, was recognized, and that the administrative agencies could, under certain circumstances, perform judicial or quasi-judicial functions. In Volume 35, Permanent Edition, Words and Phrases, at page 640, we find the term "quasi judicial functions" defined as follows:

"* * * * when the law * * * commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed 'quasi judicial.' * * * *"

Also at page 640, we find this further statement relative to quasi judicial functions:

"Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed 'quasi judicial.' Bair v. Struck, 74 P. 69, 71, 29 Mont. 45, 63 L.R.A. 481, citing Mochem, Pub. Off. Sec. 637; Bish. Non-Cont. Law, Sections 785, 786; People ex rel. School Dist. No. 5 in Mineral County v. Van Horn, 77 P. 978, 982, 20 Colo. App. 215, quoting with approval Bish. Non-Cont. Law, Sections 785, 786."

If the establishment of a public road is purely county business, then, under Article VI of Section 7 of the Constitution, there would be no question but that the county court would have jurisdiction to perform these duties. Again referring to the statutes we find that they require, (1) the petition for the establishment of the road to be signed by twelve free-holders out of the municipal township or townships through which the proposed road may run, three of whom shall be in immediate neighborhood, (2) it shall specify the proposed beginning, course, and termination

thereof, (3) shall be accompanied by all names of persons owning land through which said road shall run, (4) the amount of damages, if any, claimed by them, so far as can be ascertained, (5) the names of those who are willing to give the right of way for the proposed road. Section 8474, R. S. Mo. 1939, requires the posting of handbills giving notice of the intended application for the establishment of the road.

Under Section 8475, R. S. Mo. 1939, after the petitioners have made proof of the posting of the notices, if no remonstrance is filed, and if the petitioners give the right of way for the proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by the landowners through whose land said proposed road would run, the court must, without discretion to do otherwise, open said road. Under this provision of the law, there is no question but that the court performs merely a ministerial function, and does not exercise any discretion. We do not think that there is any question but that this provision of the act is not in conflict with the provision of the 1945 Constitution which takes away from the county court judicial functions.

If a remonstrance is filed to the petition for the establishment of the road, then the county court is required to hear witnesses and pass upon the question of the public necessity, practicability and probable damages, if any claimed by the owner of the land through which it is proposed to establish such road. The court must also investigate as to the expense of establishing and building a road, including bridges and culverts.

Then, if the court, on a hearing, finds that the facts of the case do not justify the establishment of the road at the expense of the county or the petitioners, proceedings are dismissed. On the other hand, if it finds that the facts justify the establishment of the road, either at the expense of the county, or at the expense of the petitioners, or both, it makes an order accordingly. The law further provides that if the court finds it necessary to establish the road at the expense of the county, or if it be found necessary to establish the road either wholly or partially at the expense of the petitioners and the petitioners pay into the county treasury within the time fixed by the court, the probable amount of the damages to the use of the owners of the said lands, then the court makes an order directing the engineer to (1) view, mark out, and survey the road, (2) take all relinquishments of the right of way, (3) take the names of all owners of land, through which the road runs, (4) the names of those who

have not given or will not give the right of way, (5) and the amount of damages claimed by each one separately, together with the description by section and subdivision thereof, and (6) the engineer's estimate of the cost of the bridges, culverts and grading that may be necessary. The engineer is required to report his proceedings to the court within a time prescribed by the court. The section further provides that, if it shall appear from the report of the engineer, the right of way has been secured, the deeds have been filed, and that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners, the court without exercising any discretion must order the road established.

Section 8476, R. S. Mo. 1939, makes provision for the appointment of commissioners in case the landowners fail to agree to the amounts fixed by the court as damages for taking the land for road purposes. These commissioners view the premises taken, assess damages, if any, and report back to the county court. If exceptions are taken to the report of the commissioners, the county court has no further jurisdiction in the premises. If exceptions are not taken, then the court enters the order establishing the road, and provides for the payment of the damages, if any, as fixed by the commissioners. These duties would seem to be business functions of the county and within the classification contemplated by Section 7 of Article VI of the Constitution of 1945.

From the foregoing, it will be seen that the county court does perform some judicial functions in the procedure providing for the establishment and vacation of public roads. However, we think that the duties of the county court with respect to the establishment of public roads are quasi judicial and administrative, and that there is as much, or more, "county business" in the establishment of a public road than there is judicial function.

A rule on the construction of the constitutional provision relating to the legislative, executive and judicial departments of government is stated in State ex rel. Lionberger v. Tolle, 71 Mo. 645. The substance of that rule is that limitations of the article relative to the divisions of the government are liberally construed when it is not easily determined where the power may be lodged.

We recognize the fact that there is some doubt as to whether or not the duties of the county court with respect to the establishment of public roads are judicial. However, that is debatable. Applying the rule that "the court resolves all doubts in favor of the constitutionality of a statute, and its unconstitutionality

must appear beyond a reasonable doubt before it will be declared unconstitutional," then the statutes relative to the establishment of public roads could be upheld under the 1945 Constitution by holding that the functions of the county court relative to the establishment of such roads are not purely judicial, but are both quasi judicial and are county business.

Conclusion

From the foregoing, it is the opinion of this department that county courts have authority under the new Constitution and Article I, Chapter 46, R. S. No. 1939, to establish and vacate public roads.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:LR

CONTINGENT FUND OF
PROSECUTING ATTORNEYS
COUNTIES OF FIRST CLASS:
CONSTITUTION:

Section 13470, R.S. Mo., 1939, in-
consistent with Article VI, Section
13, Constitution, 1945, therefore,
ineffective after July 1, 1946.

July 26, 1946

FILED

68

Honorable Michael W. O'Hern
Prosecuting Attorney
Jackson County
Courthouse
Kansas City, Missouri

Dear Sir:

We hereby acknowledge receipt of your request for an
opinion, which reads as follows:

"I would like to get a little information
concerning the contingent fund of the
office of the Prosecuting Attorney of
Jackson County, Missouri, and I am of the
opinion that Section 13470, Revised Statutes
of Missouri 1939 applies to Jackson County.

"At the present time there is probably
\$600.00 in the contingent fund and on July
8th, there is a murder case especially set
in this county before Judge Broadus and
it is a case that will require considerable
expense in bringing witnesses from different
parts of the country.

"Today I was informed by Mr. Kirby, County
Treasurer, that he was of the opinion that
on and after July 1st of this year no checks
would be honored on this contingent fund.
If this is true, it will certainly handicap
this office in the preparation of this very
important trial.

"Would you kindly let me know at once if in
your opinion under the existing circumstances
that the County Treasurer would be justified
in refusing to honor our checks. I might
state for your benefit that the County Treasur-
er has no intention in any way of tying the

hands of my office but he does not want to honor the checks if the law prohibits him of doing it after July 1st.

"Would you let me know what your opinion is concerning this matter."

Section 13470, R.S. Mo. 1939, referred to in your request, provides:

"The treasurer of said county shall set aside the prosecuting attorney's fees, so turned into the treasury of said county, to be used as a contingent fund for the prosecuting attorney for the payment of the incidental expenses in bringing parties and witnesses from other states or counties and in properly preparing cases for trial, attending trial on changes of venue, attending at the taking of depositions, in printing briefs, and appearing before the appellate courts of the state, and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office. Such fund shall be paid out as needed to the prosecuting attorney by the said county treasurer out of said fund in the treasury of said county, not exceeding two thousand five hundred dollars in any year, upon warrant of the prosecuting attorney, approved and signed by the judges of the criminal court of said county. At the end of each year said county treasurer shall pay into the general revenue fund of said county any balance that may be in his hands from fees, so collected, exceeding the sum of one thousand dollars."

The problem presented is this--is Section 13470, R.S. Mo. 1939, effective after July 1st so that the Treasurer of Jackson County should continue to honor the warrants of the Prosecuting Attorney drawn on the contingent fund provided for therein?

In order to arrive at the solution to this question, we must determine whether this section is consistent with the Constitution of Missouri, 1945. If it is inconsistent, Section 2 of the Schedule of that Constitution causes Section 13470, R.S. Mo. 1939, to be ineffective. Section 2 of the Schedule provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

The particular section of the Missouri Constitution of 1945 with which we are immediately confronted is Article VI, Section 13, wherein it is stated:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law." (Underscoring ours.)

In the application of this latter constitutional provision, we must determine the status of the contingent fund referred to in Section 13470, R.S. Mo. 1939, supra. This particular fund has never received an interpretation in the courts of our state. In our search for a definition of this type of fund, we

have gone to other jurisdictions, and find, in the case of First National Bank of Norman v. City of Norman, 75 P. (2d) 1109, 1. c. 1110, 182 Okla. 7, the following statement:

"In general terms, where such funds exist, a contingent fund is ordinarily a fund which is set up from which to pay items of expense which will necessarily arise during the year, but which cannot appropriately be classified under any of the specific purposes for which other taxes are levied. 1 Pope's Legal Definitions, 273; People v. Cairo, V. & C. Ry. Co., 247 Ill. 360, 363, 93 N.E. 405. See, also, McQuillin on Municipal Corporations, vol. 5, Sec. 2179; State v. Kurtz, 110 Ohio St. 332, 144 N.E. 120; Mitchell v. St. Paul, 114 Minn. 141, 130 N.W. 66; Heston v. Atlantic City, 93 N.J.L. 317, 107 A. 820."

In view of this definition, which is supported by the authorities cited therein, we conclude that the contingent fund established by Section 13470, R.S. Mo. 1939, does not constitute a part of the general revenue fund, since it cannot appropriately be classified under any of the specific purposes for which other taxes are levied. Having thus concluded, we hold that Section 13470, R.S. Mo. 1939, is in conflict with Article VI, Section 13, Constitution of Missouri of 1945; and, under the operation of Section 2 of the Schedule, it is, therefore, ineffective after July 1, 1946. The fees collected by the office of the prosecuting attorney of Jackson County should be paid into the general revenue fund. The County Treasurer of Jackson County should, therefore, not continue to honor the warrants of the Prosecuting Attorney which were, prior to July 1, 1946, payable from the contingent fund as provided in Section 13470, R.S. Mo. 1939.

Although we believe the above is sufficient, we will point out another discrepancy between Section 13470, R.S. Mo. 1939, and the Constitution of Missouri, 1945. Article VI, Section 8, thereof provides:

"Provision shall be made by general laws for the organization and classification of

counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

It is to be noted that Section 13470 commences, "The treasurer of said county * * *," which refers back to Section 13467, Laws of Mo. 1941, page 533, Section 1, which provides in part: "In all counties in this state which now have or which may hereafter have a population of not less than 350,000 nor more than 750,000 inhabitants according to the last preceding Federal decennial census * * *."

By virtue of the mandate laid down by Article VI, Section 8, supra, the Legislature had enacted House Bill No. 476 classifying counties by evaluation. Any law applicable to one county of a particular class is also applicable to all other counties of that class. Section 13470 does not fall within any of the classes so established, since it is based upon population rather than evaluation, and is, therefore, ineffective. Jackson County is now a county of the first class for legislative purposes, and a law applicable to counties of a certain population does not meet the dictates of Article VI, Section 8, Constitution of Missouri, 1945.

CONCLUSION

It is the opinion of this department that Section 13470, R.S. Mo. 1939, is inconsistent with Article VI, Section 13, Constitution of Missouri, 1945; and, applying Section 2 of the Schedule, Constitution of Missouri, 1945, is ineffective after July 1, 1946.

Hon. Michael W. O'Hern

-6-

It is our further opinion that Section 13470, R.S. Mo. 1939, is ineffective, since it does not meet the dictates of Article VI, Section 8, Constitution of Missouri, 1945, and House Bill No. 476 enacted by the 63rd General Assembly.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

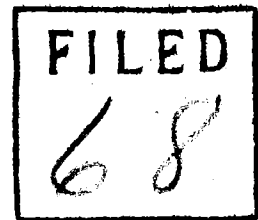
APPROVED:

J. E. TAYLOR
Attorney General

JMA:LR

HIGHWAY DEPARTMENT: The legislature may regulate the Highway Department in any way which is not inconsistent with the limitations imposed upon the legislature by the constitutional provisions of the state or nation.

August, 13, 1946



Honorable Daniel O'Bryan,
Representative
House of Representatives
Jefferson City, Missouri

Dear Mr. O'Bryan:

In your recent request for an opinion you asked the following questions:

"Will you please advise me of the meaning of Section 30, Article 4, 1945 Constitution of Missouri, wherein is stated ".....Shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:..."

"The meaning of this clause has always bothered me. Does it mean that the Highway Department is independent of the legislature, or just what does it mean? I am a member of the Appropriation Committee and would like to have this matter clarified.

"I understand that there has been no audit of the Highway Department. Has the legislature no inherent power to regulate this department?

"I would appreciate it if you would inform me fully on this matter."

In your letter you quoted a portion of Section 30, Article IV of the Constitution of 1945, and then asked the following two questions:

- (1) "Does it mean that the Highway Department is independent of the legislature, or just what does it mean?"
- (2) "Has the legislature no inherent power to regulate this department?"

The nature of these questions is so similar that an answer to one will be an answer to the other.

Section 30, Article IV, Missouri Constitution for 1945, provides, in part, as follows:

"Sec. 30. Source and Application of Highway Funds.--For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: * * *"

In Volume 7, Missouri Digest, under "Constitutional Law", Key 13, the following rules are found:

"Where the meaning of the Constitution is plain and unequivocal, and its intent clear and unmistakable, the courts have nothing to do with the policy of the rule established, but must accept the spirit of the rule as well as its letter, and enforce it as if they believed in its wisdom.--McGrew v. Missouri Pac. Ry.Co., 132 S. W. 1076, 230 Mo. 496; Id., 166 S. W. 1033, 258 Mo. 23.

"In construing provisions of Constitution intent of instrument is paramount.--State ex rel. Harry L. Hussmann Refrigerator & Supply Co. v. City of St. Louis, 5 S. W. (2d) 1080, 319 Mo. 497, followed in State ex rel. Rosebrough Monument Co. v. Same, 11 S. W. (2d) 1010."

As to the meaning of the language used in the constitution by the framers, the judiciary has laid down the following rule for guidance in interpretation. The general rule is announced as follows:

"In construing the language of a constitution, the words used, unless they are technical, are to be understood in their usual and ordinary sense.--(1912) State ex rel. Barrett v. Hitchcock, 146 S. W. 40, 241 Mo. 433; (1915) State ex rel. and to Use of Buck v. St. Louis & S. F. R. Co., 174 S. W. 64, 263 Mo. 689."

Applying those two rules to the above quoted section of the constitution it is apparent, as stated in the constitutional provision quoted supra, that a special fund is set up over which there is no legislative control as to the appropriation of said fund; and in addition the said constitutional provision provides its own limitation that the fund is to be used for stated purposes and no others. Furthermore, said constitutional provision specifically provides for the sources of said fund. Read with the intent found in the provision, and giving the language its ordinary meaning as is required by the judicial decisions, there should be no confusion to what the provision provides for. It may be that there is some confusion because of Section 36, Article III, of the Constitution for 1945, which requires that:

"Limitation of Withdrawals to Appropriations--
Order of Appropriations.--All revenue collected and moneys received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:
* * * *"

The distinction, however, is that the fund, under Section 30, Article IV of the Constitution of 1945, is a special and distinct fund and is outside the legislative power to control.

Answering your two questions stated above, it is necessary to construe the constitution as to whether or not it is a grant or limitation of powers. Affirmative decisions of this state, holding that the state constitution is not a grant of power, but is a limitation on the legislative power, can be found in Volume 7, Missouri Digest, Section 26, in which the specific statement of the rule is found:

"A state constitution is not a grant but a limitation on legislative power, so that the Legislature may enact any law not expressly or inferentially prohibited by the Constitution of the state or nation.--(1901) *Ex parte Roberts*, 65 S. W. 726, 166 Mo. 207; (1905) *State ex rel. Henson v. Sheppard*, 91 S. W. 477, 192 Mo. 497; (1910) *McGrew v. Missouri Pac. Ry. Co.*, 132 S. W. 1076, 230 Mo. 496; *Id.*, 166 S. W. 1033, 258 Mo. 23; (1912) *Harris v. William R. Compton Bond & Mortgage Co.*, 149 S. W. 603, 244 Mo. 664; (1913) *State v. St. Louis, I. M. & S. Ry. Co.*, 162 S. W. 144, 253 Mo. 642; (1916) *State ex rel. Moberly Special Road Dist. v. Burton*, 182 S. W. 746, 266 Mo. 711; *State ex rel. Columbia Special Road Dist. v. Johnson*, 182 S. W. 750; *Williams v. United States Express Co.*, 184 S. W. 1146; (1917) *State ex rel. Rhodes v. Public Service Commission of Missouri*, 194 S. W. 287, 270 Mo. 547; (1918) *Ludlow-Saylor Wire Co. v. Woolbrinck*, 205 S. W. 196, 275 Mo. 339."

In other words, the legislature may regulate the Highway Department in any way that is not prohibited, either expressly or by inference, by the Constitution of the State of Missouri or the nation.

Applying that rule to Section 30, Article IV, the legislature shall have no power to destroy said "special fund" created by said section of the Constitution, or require that there be a legislative enactment for the appropriation out of said fund, but legislative enactments may be applied to the fund not inconsistent with the constitutional limitations.

Further illustrations of the limitations imposed upon the Legislature as to regulating the Highway department may be found in the annotations of Section 44a, Art. 4, of the Constitution of 1875, which section is in substance like the one under consideration. There specific cases note the extent of the Legislature's powers. Section 44a, Article 4, was an amendment to Section 44, and was adopted November 6, 1923. A case of especial interest was *State ex rel. McKinley Pub. Co. v. Hackmann*, 232 S. W. 1007, 314 Mo. 33, wherein the Court held:

"This section, (section 44, Art. 4) before 1928 amendment, held not to appropriate without legislative action money to pay maintenance expense of state highway commission." (insert ours).

That express recognition by the Court in the Hackmann case, supra, that the Constitution may make provision for the appropriation of funds that do not come under the Legislature's control is evident. However, the power arose by virtue of an amendment and did not come by reason of Section 44 alone. As in the present section, Section 30, Article IV, Constitution of 1945, the provision for the appropriation of funds without Legislative control is provided for. With this limitation upon the Legislature, the Legislature cannot require that the funds be disbursed only with their permission or authority. It is a matter for the Highway Commission to determine.

Further, we would like to point out, in the Hackmann case, supra, that the court, in analysing Article IV, Section 44A, Constitution of 1875, pointed out that the Highway Commission is to be maintained from public or state revenues. At l. c. 10011, the court said:

"The money out of which the highway commission is to be maintained is as much public or state revenue as any money coming into the state treasury from any source. Whether it is called motor vehicle registration fees, license fees, or a tax (all of which designations are used in section 44a of article 4 of the Constitution, vide Laws 1921, 1st Ex. Sess. p. 195), or by any other name, it is a tax levied by the state upon the right of motor vehicles to use the public streets and highways of the state. It is not only levied by the state, but is collected by it, and paid directly from the motor vehicle owners into the state treasury (Laws 1921, 1st Ex. Sess. p. 104, S. 23). The state, therefore, is interested in what use is made of revenue from that source. So much is it interested that the people, in amending the Constitution (section 44a of article 4, supra), declared

that all such taxes received by the state, less the costs of maintaining the state highway commission, should stand appropriated without legislative action for and to the payment of the principal and interest of certain state bonds and the accumulation of a sinking fund therefor. To say, therefore, that the state is not interested, and vitally interested, in the amount to be taken from this fund for the maintenance of the highway commission is not in accord with the people's action in amending the Constitution and that of the Legislature in creating the commission."

A reading of Section 30, Article IV, of the Constitution of 1945, will disclose that the same situation exists today in relation to the Highway Commission as existed at the time of the Hackmann case. In other words, Section 30 sets up a special fund for particular purposes which may be appropriated without legislative action. Funds for all other purposes are subject to legislative action. Under Article IV, Section 30 (2) it is provided that the maintaining of the Highway Commission is a purpose other than those purposes particularly enumerated whose funds are not subject to legislative appropriation.

CONCLUSION

Therefore, it is the opinion of this department, that the legislature may regulate the Highway Department in any way which is not inconsistent with the limitations imposed upon the legislature by the Constitutional provisions of the state or nation.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General
WCB:dc

CORONER:
COUNTY OFFICER'S FEE:

Coroner and employees of Jackson County
entitled to charge fee and retain same for
rendering unofficial duties not incompatible
with statutory duties.

November 25, 1946



Honorable Michael W. O'Hern
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for
an opinion which reads:

"Dr. James C. Walker, Coroner of Jackson
County, Missouri, has requested me to ask for
an opinion from your office concerning the
allowance of fees to the Coroner of Jackson
County, Missouri.

"His request includes the following specific
questions:

"(1) When the Coroner performs a post-mortem
examination, insurance companies often requests the
coroner for affidavit concerning the cause of death.
Query: May the coroner of Jackson County, Missouri,
legally collect and retain a fee for the making of
such affidavit and may a notary public employed in
the office of the coroner legally collect and retain
a fee for acknowledgement of such affidavit.

"(2) The coroner keeps a record of all autopsies
performed by his office. Requests are often made to
the coroner to furnish copies of these reports. Query:
May the coroner of Jackson County legally collect and
retain fees for supplying copies of said autopsy
reports.

"(3) Whenever an autopsy hearing is had before
a coroner's jury, the testimony of all the witnesses
is taken in shorthand and transcribed by an employee
of the coroner's office. Requests are often made by
individuals or insurance companies for copies of such
transcripts. Query: May an employee of the coroner's
office of Jackson County legally collect and retain
fees for supplying copies of these transcripts to
interested parties."

It is well established under the law that no public officer is entitled to fees of any kind for performing official duties unless it is provided for by statute. Furthermore, that the rendition of services by a public officer is deemed to be gratuitous unless compensation therefor is provided by statute. See *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 344 Mo. 795. Also *Ward v. Christian County*, 111 S.W. (2d) 182, 341 Mo. 1115.

In view of the foregoing authorities, if the services mentioned in your letter constitute official duties required of said officer and employees, then they are only entitled to such fees as are provided by law, and in the absence of any such provision allowing them compensation, they shall perform same gratuitously. A careful search of the statutes fail to disclose wherein those services specifically mentioned in your request are a part of the official duty of said officer and employees. Nowhere is there any statute either requiring or authorizing such officer and employees to furnish persons certified copies of affidavits, documents and transcripts, so it naturally follows there is likewise no statutory fee or compensation for such service.

Section 13444, R.S. Mo. 1939, requires a coroner to account for all fees collected, giving the date same were collected, the case, and the name of the person entitled to same. Section 13247, R.S. Mo. 1939, allows a fee for the coroner for taking down testimony at an inquest and for certifying the same. However, there is no provision for furnishing certified copies to individuals, insurance companies, etc. Section 13424, R.S. Mo. 1939, authorizes various other fees for services rendered by the coroner. Section 13259, R.S. Mo. 1939, provides that in counties containing more than 100,000 inhabitants, the county court, in its discretion, may fix a salary for the coroner in lieu of all fees. However, said salary shall not exceed \$4,000.00 per annum. Subsequent thereto, the 63rd General Assembly passed House Bill No. 828, which is now effective, and specifically repeals Section 13259, supra. Section 13465, page 532, Laws of Mo. 1941, fixes a salary for coroners in counties having a population of 350,000 and less than 750,000, which applies to Jackson County, Missouri. Furthermore, Section 3738, R.S. Mo. 1939, provides that certified copies of proceedings before coroners holding an inquest, over the body of an employee receiving injuries in course of employment, resulting in death shall be admissible in evidence. However, there is no mention of a fee for such services rendered by the coroner.

Therefore, we are forced to the conclusion that such services are not official duties as prescribed under the law.

The question now boils down to whether persons performing such unofficial services may charge a fee and retain said fee for such unofficial services rendered. We are unable to find any authority in the State of Missouri directly in point. However, we do find decisions in other states holding that fees or compensation may be charged by a person or persons rendering unofficial services, and said persons may retain said fees or compensation so long as the service is not incompatible with the duties of the respective offices. In *State v. Holm*, 70 Neb. 606, a petition for a writ of mandamus was filed against the defendant to compel him as Register of Deeds of Lancaster County to enter certain money on his fee book and account for and pay over same to the county. While the defendant was Register of Deeds, the City of Lincoln required every applicant for a saloon licence to obtain a certificate of the Register of Deeds showing that persons signing the licensee's petition were freeholders. The defendant made a search of the records and furnished many certificates. For such investigation he charged \$3.50, and, in addition thereto, 50¢ for a certificate as Register of Deeds. He reported in the fee book the 50¢ for the certificate and paid same to the county, but did not report the \$3.50 fee for investigation, claiming that the \$3.50 was no part of his official duties. The defendant was on an annual salary, and it was contended that he received the foregoing fees by virtue of his office and should account for same. The court conceded that, if the services rendered were a part of his official duty, there would be no question but that he should account for same and pay said fees into the treasury. The cases the relator cited in support of his petition under the fact showed the services rendered by the public officers constituted a part of their official duties, and, therefore, such cases were not in point. The court finally concluded in the above case that the services rendered by the respondent constituted no part of the official duties of his office, and held that such money paid for such extra services under a private contract or agreement could not be recovered by said relator, and, therefore, the District Court committed no error in denying the writ and dismissing said action.

In *Moore v. Sheppard*, a very recent decision reported in 192 S.W. (2d) 559, the Supreme Court of Texas held that the general principle prohibiting public officers from charging fees for performance of their official duties does not prohibit them from charging for their services for acts that they are under no obligation under the law to perform. In that case several clerks of Courts of Civil Appeal sought a mandamus to compel George H. Sheppard, Comptroller of Public Accounts, to issue warrants on the State Treasury for the payment of their salaries. It seems that said clerks were allegedly indebted to the State, and there

was a state statute which provided that no warrant shall be issued to any person indebted to the state. The indebtedness referred to consisted of money received by petitioners for furnishing uncertified and unofficial copies of opinions of their respective courts. The facts show that it is undisputed that said clerks received money for furnishing such copies and retained said money. The law required said clerks to receive a fee of 10¢ for each 100 words for making copies of any papers or records in their offices, including certificate of seals. The Attorney General of the State of Texas had construed such provision to not include the furnishing of uncertified unofficial papers. The court, in granting said writ, said, l.c. 562:

"There being no statutory duty requiring petitioners to furnish uncertified, unofficial copies of opinions of the Courts of Civil Appeals, no statute fixing any fee for such services, and no valid statute requiring that money received therefore be deposited in the State Treasury, there is no debt owing by petitioners to the State. Since petitioners are not required to account to the State Treasurer, under the existing statutes, for such receipts, they cannot be required to execute an affidavit that such funds have been deposited in the State Treasury as a condition for the delivery of their monthly salary warrants.

"The mandamus prayed for by petitioners is granted."

CONCLUSION

Therefore, it is the opinion of this department that the services referred to in your request do not constitute a part of the statutory duty of said coroner and employees, and that such services are not incompatible with their statutory duties; and, in view of the foregoing authorities, said coroner and employees may charge a fee for such services rendered and retain same.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

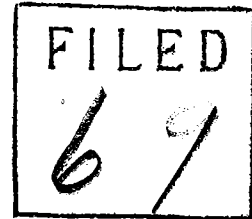
APPROVED:

J. E. TAYLOR
Attorney General

ARM:LB

ELEEMOSYNARY INSTITUTIONS: Purchasing Agent authorized to conduct sale of livestock, produce, etc., produced by eleemosynary institutions and pay proceeds therefrom into revolving fund of institution until such fund reaches \$5000, and any surplus above that paid into state treasury to credit of the fund for the support of eleemosynary institutions.

April 17, 1946



Honorable W. R. Painter
President, Board of Managers
State Eleemosynary Institutions
Capitol Building
Jefferson City, Missouri

Dear Governor Painter:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"We are of the belief that under Section 9299, R. S. Mo., 1939, the Board of Managers of the State Eleemosynary Institutions acting through the steward of the various institutions has the authority to sell livestock, produce and other commodities produced by the institutions and the moneys derived therefrom to be paid into a revolving fund.

"The State Purchasing Agent is of the belief that under Section 14595 such sales should be handled by his department and that the proceeds therefrom should be turned over to the State Treasurer.

"We should like to be advised as to which process is authorized to handle such sales."

At the outset it is well to include the sections of the statute to which your request makes reference. Section 9299, R. S. Mo. 1939, provides:

"Upon a request from the board, the state auditor is hereby authorized

and directed to draw a warrant payable to the steward of each of the institutions herein named, in an amount to be specified by the board, not to exceed, however, the sum of five thousand dollars, and the sum so specified shall be placed in the hands of the steward as a revolving fund to be used in the payment of the incidental expenses of the institution for which he has been appointed; and all moneys arising from the sale of live stock, produce, or other commodities produced by such institution shall be paid into said revolving fund, and whenever the amount thereof exceeds the sum of five thousand dollars, then such surplus shall be paid into the state treasury to the credit of the fund for the support of eleemosynary institutions. The steward shall keep a true and accurate account of all moneys received and of all moneys paid out of said fund and shall take and preserve vouchers for all expenditures therefrom. Whenever said fund shall fall below the amount necessary to have on hand for the payment of incidental expenses, and within the limits of the maximum herein prescribed, the state auditor shall, upon request of the board, make additional allowances to said fund by drawing his warrant upon the state treasurer for the amount necessary to replenish said fund."
(Underscoring ours.)

Section 14595, R. S. Mo. 1939, provides:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the appropriations of the departments concerned. He shall also have power, subject to the same

provisions as for bids for purchases,
to sell any surplus or unneeded sup-
plies or property in his hands or
owned by the state or any department
thereof. He shall keep currently an
inventory of all removable equipment
owned by the state." (Underscoring
ours.)

It might appear at first blush that the underscored portions of these sections are not harmonious. If it be that there is any inconsistency between them the Purchasing Agent Act must prevail since it also provides in Section 14602 thereof as follows:

"All acts or parts of acts inconsistent or in conflict with this chapter are hereby repealed to the extent of such inconsistency or conflict."

This section was adopted in 1933 as part of the State Purchasing Agent Act, whereas the State Eleemosynary Institution Act was adopted in 1921, and it would be effective if Sections 9299 and 14595, supra, were inconsistent. However, we are bound to follow the rule as set out in the case of *Graves v. Little Tarkio Drainage Dist. No. 1*, 134 S. W. (2d) 70, 1. c. 81, 345 Mo. 557, wherein it is stated:

"* * * 'Repeals by implication are not favored--in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand. These principles of construction are well settled.' State ex rel. and to Use of Geo. B. Peck Co. v. Brown, 340 Mo. 1189, 1193, 105 S. W. 2d 909, 911. * * *"

Accordingly, it is possible to reconcile these two sections. Section 9299 does place the stewards of the various

eleemosynary institutions in charge of the revolving funds. This section further provides that "all moneys arising from the sale of live stock, produce, or other commodities produced by such institution shall be paid into said revolving fund, and whenever the amount thereof exceeds the sum of five thousand dollars, then such surplus shall be paid into the state treasury to the credit of the fund for the support of eleemosynary institutions." This phrase does not specifically name any person or officer to conduct such sales but merely provides for the depositing of the moneys arising therefrom. On the other hand, Section 14595, supra, is specific in its terms wherein it states that the purchasing agent "shall also have power * * * to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof." Under this provision the purchasing agent is authorized to handle the sales referred to in Section 9299.

Conclusion

It is, therefore, the opinion of this department that the sale of livestock, produce, or other commodities produced by the eleemosynary institutions, as provided in Section 9299, R. S. Mo. 1939, should be under the direction of the State purchasing Agent by virtue of the authority vested in him under Section 14595, R. S. Mo. 1939, and that he, the State Purchasing Agent, should then pay the proceeds therefrom into the revolving fund of the institution for which he has conducted such sale. Such fund is not to exceed five thousand dollars and any surplus above that shall be paid into the State Treasury to the credit of the fund for the support of eleemosynary institutions.

Respectfully submitted,

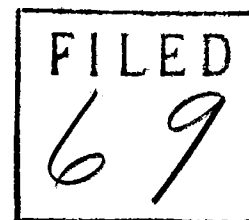
J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELEEMOSYNARY INSTITUTIONS:) Hospital fees arising out of compensation
TUBERCULOSIS HOSPITAL:) litigation should be paid to Commissioners
of the Tuberculosis Hospital, who turn
such fees over to the Treasurer of the
Board.

May 28, 1946



6/3
Honorable W. R. Painter
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Governor Painter:

I hereby acknowledge receipt of your request for
an opinion, which reads as follows:

"We are enclosing copy of a letter received from the superintendent of
Jasper County Tuberculosis Hospital.

"We would appreciate an opinion on
this matter at your earliest convenience in order that the proper method
of handling the case can be inaugurated."

The letter referred to in your request is as follows:

"An unusual situation has arisen relative to a Mr. William Tudor, a patient in this institution maintained by Jackson County the greater portion of the time since April 21, 1943. From that date to April 1, 1946 I have drawn upon State Aid funds for his maintenance in this hospital to the extent of \$1868.03. He has brought action in some court, probably the compensation courts, and has been awarded a weekly compensation and the payment of his hospitalization fees.

"The Liberty Mutual Insurance Company had advised me that they will pay this amount to us to be credited to the State Aid accounts if you will authorize them to do so. As I understand it, they desire a letter of authorization from you

to me directing that this amount be paid to this hospital, which in turn will be credited to State Aid funds which we draw upon each month."

The money concerned in this request is that amount which is designated as hospitalization fees to be paid by the Liberty Mutual Insurance Company. With regard to the payment of these fees, Section 3701, R. S. Mo. 1939, provides:

"In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment, including nursing, ambulance and medicines, as may reasonably be required for the first ninety days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount of sum of seven hundred and fifty dollars, and thereafter such additional similar treatment as the commission by special order may determine to be necessary. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where such requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities." (Underscoring ours.)

Therefore, we must determine who are the proper authorities to receive such fees in this case. It is provided in Section 15173, R. S. Mo. 1939, in part, that:

"Within sixty days after such election has been held, if two-thirds of the legal voters of the county voting on said proposition, have voted in favor of the proposition to issue bonds for the erection and equipment of a tuberculosis hospital, the county court shall be authorized to issue and sell said bonds to the highest and best bidder, and shall appoint five persons who shall constitute a board to be known as the board of tuberculosis hospital commissioners. A majority of said board

shall constitute a quorum and shall be authorized to transact the business of the board. Said board shall have exclusive control of all moneys collected to the credit of the tuberculosis hospital fund, and of the supervision, care and custody of such hospital, and all moneys received for such hospital purposes, whether by sale of said bonds or by an appropriation from the taxes collected annually in each county for the maintenance and support of said hospital, or from any other source, shall be turned over to the treasurer of said board, and shall be duly accounted for in monthly and annual reports made to said board, a copy of which shall be filed with the clerk of the county court. * * *
(Underscoring ours.)

Reading these two sections together it is apparent that the proper authorities to receive these fees are the members of the Board of the Jasper County Tuberculosis Hospital Commissioners. They in turn should hand the fees over to the Treasurer of the Board to be applied to the expenses of Mr. William Tudor.

We have been advised by telephone that the state aid funds referred to in the letter of Mr. Jesse E. Douglass are the appropriations set aside by the Legislature to the use of the tuberculosis hospitals. There is no statutory provision whereby such fund is authorized to be the recipient of moneys to be paid for the hospitalization of a patient in a tuberculosis hospital, which moneys arise as the result of a workmen's compensation decree. To the contrary, as set out above, the Board of Commissioners is to receive the money involved, and none of the statutes pertaining to the duties of the President of the Board of Managers of the Eleemosynary Institutions gives him authority to direct the disbursement of such funds.

Conclusion

It is, therefore, the opinion of this department that the President of the Board of Managers of the State Eleemosynary Institutions should not authorize the Liberty Mutual Insurance

Honorable W. R. Painter - 4

Company to credit the hospitalization fees allowed Mr. William Tudor by the compensation commission to the state aid funds. Under Section 15173, R. S. No. 1939, such fees should be paid to the Board of the Jasper County Tuberculosis Hospital Commissioners, who should turn the fees over to the Treasurer of that Board.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. B. TAYLOR
Attorney General

JMA:EG

FEEES:

Clerk, recorder and sheriffs; third class counties.

July 8, 1946

FILED

69

7/16

Mr. E. Glenn Parsons
Circuit Clerk
Shelbyville, Missouri

Dear Sir:

Reference is made to your letter under date of July 3, 1946, requesting a list of fees and reading as follows:

"Please send me a list of all the fees chargeable in the Circuit Clerk and Ex-Officio Recorder office, giving the changes, if any, made July 1, 1946.

"Also, send a list of the Sheriff's fees to be collected."

The list of fees chargeable in the circuit clerk and ex-officio recorder's office can be found in the following sections of the Revised Statutes of Missouri 1939, and statutes referred to therein:

717	1068	1073	1074	1312
1315	1427	1695	3366	3483
3489	3430	3491	3552	3563
3566	3604	3643	3644	3647
4236	4243	4244	4248	10975
12326	12338	12345	12372	12448
12469	12495	12509	12516	12530
12532	12536	12537	13171	13178
13181	13346	13407	13408	13409
13410	13426	13436	14412	

The list of sheriff's fees may be found at the following Revised Statutes of Missouri, 1939, and statutes referred to therein:

1068	1163	1466	1769	1808
3995	5477	9002	9004	9219
9349	9354	9355	11221	11598
12468	12469	12530	12729	13036
13140	13411	13413	13414	14203
14221	15428			

The only changes made by the present Legislature are the following:

1. H. B. No. 899, which provides for compensation of sheriffs in counties of the third class, which is now law, and provides as follows:

"

AN ACT

"To provide for the salary and compensation of sheriffs in counties of the third class; providing for the appointment and compensation of deputies and assistants, providing for the collection and disbursement of fees by such sheriffs; providing for the administration of jails in such counties, and providing a penalty for violations of said act, with an emergency clause.

"Section 1. The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: In counties having a population of less than 7,500 the sum of \$1000; in counties having a population of 7,500 and less than 10,000 the sum of \$1200; in counties having a population of 10,000 and less than 11,500 the sum of \$1400; in counties having a population of 11,500 and less than 15,000 the sum of \$1600; in counties having a population of 15,000 and less than 24,000, the sum of \$1900.00; in counties having a population of 24,000 and less than 30,000, the sum of \$2500.00; and in counties having a population of 30,000 and more, the sum of \$2800.00.

"Section 2. The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order

permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment.

"Section 3. It shall be the duty of the sheriff in counties of the third class to charge and collect in all instances every fee, both civil and criminal, including mileage, accruing to his office by law, except such criminal fees as are chargeable to the county, and such sheriff shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act said fees were charged and collected, together with the names of the persons paying or who are liable for same, which report shall be verified by the oath or affirmation of such sheriff. It shall be the duty of such sheriff upon the filing of said report to forthwith pay over to the county treasurer all fees arising in connection with the investigation, arrest, prosecution, custody, care, commitment and transportation of persons accused of or convicted of a criminal offense during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the county court and every such sheriff shall be liable on his official bond for all such criminal fees collected and not accounted for by him and paid into the county treasury; provided that he shall retain all fees collected by him in civil matters.

"Section 4. The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury.

"Section 5. In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual expenses for each mile travelled in serving warrants or any other criminal process not to exceed five cents per mile.

"Section 6. In addition to the compensation provided in this act the county court may, in its discretion, furnish living quarters for the sheriff.

"Section 7. All salaries provided in this act shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury. Claims for reimbursement for travel shall be submitted to the county court monthly and paid at the end of the month by warrant drawn on the county treasury by the county court.

"Section 8. Any sheriff or deputy sheriff who shall willfully violate any provision of this act shall, upon conviction, be guilty of a misdemeanor. Willful failure and neglect on the part of any sheriff to comply with any of the provisions of this act for a period of two months shall be deemed to have forfeited his office and such office shall be deemed and declared to be vacant, in addition to the criminal penalty herein provided.

"Section 9. All acts or parts of acts inconsistent with this act are hereby repealed."

2. H. B. No. 855, which repealed Sections 13297 and 13298, R. S. Missouri 1939, and enacted in lieu thereof Sections 13296 and 13297, which are now law:

"Section 13296. In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: petitions, summons, affidavit for publication of notice to non-resident or unknown defendants, sheriff's, or other officer's, return of service to summons, proof of publication of notices to non-resident or unknown defendants, answers, motions, notices of sale of property involved and proof of its publication, return of sale by any sheriff, commissioner, or other officer, in case of sale of real estate, affidavit of commissioner, notice to parties by commissioner in partition, and any other paper or pleading tending to show the service on the defendants for their appearance in such case. The clerk of the circuit court shall charge the sum of ten cents per one hundred words for the recording of papers as provided in this section, which sum shall be paid into the county treasury.

"Section 13297. Whenever, in the opinion of any court of record, or the judge or judges thereof in vacation, it shall be

necessary for the papers in cases remaining on file in the office of the clerk of such court to be bunched and incased in suitable envelopes or wrappers, labeled and re-indexed, such court, or the judge or judges thereof in vacation, may order the clerk of said court to perform such service."

3. Section 10057, R. S. Mo. 1939, was repealed by S. B. No. 435 which is now law. However, the fee of One (\$1.00) Dollar provided for for recording chiropractic licenses by the circuit clerk is in S. B. No. 435 and said fee remains unchanged.

4. S. B. No. 362, which was passed by the General Assembly and approved by the Governor March 26, 1946, provides:

"Section 1. Whenever the word 'constable' appears in any statute, except insofar as any such statute applies to the City of St. Louis and to counties of the first class, the same shall hereafter be deemed to refer exclusively to and to mean 'sheriff' unless such construction is plainly repugnant to the context of any such statute.

"Section 2. This act shall become effective on January 1, 1947 except that in counties in which the present terms of constables end after January 1, 1947, this act shall take effect at the expiration of the present terms of constables in said counties."

Respectfully submitted

C. B. BURNS, Jr.
Assistant Attorney General

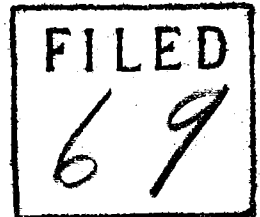
APPROVED:

J. E. TAYLOR
Attorney General

CBB:DA

DIVISION OF WELFARE: The Division of Welfare, being successor to
: Board of Managers of the State Eleemosynary In-
CONFEDERATE HOME : stitutions, shall have custody of endowment fund
: for Confederate Home.

September 6, 1946.



2/1 + B. R. Painter
Honorable W. R. Painter,
c/o Democrat Printing Company,
Carrollton, Missouri.

Dear Governor Painter:

We are in receipt of your request for an opinion under date of August 10, 1946, addressed to Honorable Phil M. Donnelly, Governor, State of Missouri, which reads:

"I have a fund of some \$24,000 in Bonds and money, gifts for the Memorial Park at the Confederate Home. This land as I see it is no longer a part of the Confederate Home, having been set aside by the Legislature as a Memorial. For the past four or five years, the state employees of the home have taken care of the Park, cut the grass and other little things that needed work. Outside of that the Park has not been a charge to the State, except the Bond I give was paid out of funds of the Home.

"It seems to me that the Park Board is really the right department to look after the Park and have charge of the fund that has been raised under direction of a state law.

"I called Mr. Proctor Carters attention to this and informed him that I was ready to turn over the Bonds and money at any time. He informed me that he is ready to take up the matter.

"The only point I make is for the State to decide finally what department this fund should go to that the interest may be used to keep the Park in order. The interest will not be sufficient to keep it in first class condition, therefore it seems to me that it should go to the Park fund so it can be well kept.

"Will be glad to hear from you as I want to give those funds to some one this week."

We are assuming the fund referred to in your letter is the money received under the will and in the estate of C. T. Jaquith; the relevant parts of said will read:

"Fourth: I direct and instruct my executors, to be hereinafter named to pay to the Managing Officers of the Masonic Home of St. Louis, Missouri and their successors in said office of the Masonic Home for the use and benefit of said Masonic Home; and the Board of Managers of the Confederate Home at Higginsville, Missouri, and their successors in office of said Board of Managers, for the use and benefit of said Confederate Home, all the remainder and residue of my estate, both real and personal, in equal parts, share and share alike.

"Fifth: After the death of my beloved wife, Florence Jaquith, I give, devise and bequeath all the real estate and personal property which I have bequeathed to her in the second clause, of this my last will and testament, during her natural life; to the Managing officers of the Masonic Home at St. Louis, Missouri, and their successors in said office of said Masonic Home, for the use and benefit of said Masonic Home; and the Board of Managers of the Confederate Home at Higginsville, Missouri; and their successors in office of said Board of Managers, for the use and benefits of said Confederate Home at Higginsville, Missouri; to each one half ($\frac{1}{2}$), that is to be divided in two equal parts, share and share alike.

"The bequests, both real and personal, made and devised to the Masonic Home at St. Louis, Missouri, and to the Confederate Home at Higginsville, Missouri, I direct and instruct shall go to the Endowment Funds of said Masonic Home and said Confederate Home; and the income and interest thereon to be used for the benefit of said Masonic Home and said Confederate Home."

The foregoing clauses of said will clearly indicate that the income only from the money received under said will shall be used for the benefit of the Confederate Home, and that said fund shall vest in the Board of Managers of the Confederate Home, at Higginsville, and their successors in office.

Under Senate Bill 349, p. 14, as passed by the 63rd General Assembly, the Division of Welfare is made the successor in office to the Board of Managers of the State Eleemosynary institutions,

and said bill further provides that said Division of Welfare shall have control and administration of the Confederate Home, as heretofore lawfully exercised by the Board of Managers of the State Eleemosynary Institutions. Section 31 reads, in part:

"* * * The division of welfare shall also have control and administration over the confederate home near Higginsville, and the inmates thereof, in the same manner and to the same extent as has heretofore been lawfully exercised by the board of managers of the state eleemosynary institutions.* * *"

Section 15132 of Senate Bill 178, passed by the 62nd General Assembly, p. 955, Laws, 1943, designates the Board of Managers of the State Eleemosynary Institutions as custodian of any endowment or other funds pertaining to the Confederate Home, and said board shall have authority to accept gifts, donations or bequests for the use of the Home, and said board is further authorized to set aside from gifts, donations or bequests, a sum amounting to Seventy-five Thousand Dollars (\$75,000.00) to be maintained as a permanent endowment for the maintenance of the grounds at the Confederate Home. Said provision further authorizes said board to invest money so derived, and to use only the income therefrom.

In view of the foregoing statutes, designating the Board of Managers of the State Eleemosynary Institutions as custodian of any gifts, donations or bequests for use of the Confederate Home, and Senate Bill 349, supra, transferring the control and administration of said Confederate Home to the Division of Welfare, and said will naming the Board of Managers of the State Eleemosynary Institutions and its successors in office as custodian of said fund for the Confederate Home, it is the opinion of this department that the Division of Welfare is now entitled to custody of said fund.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney-General

ARR/LD

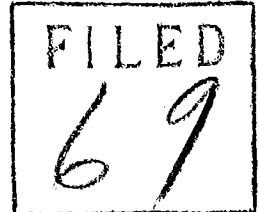
MERCHANTS' LICENSES & BONDS:

1) The tax rate to be charged for merchants' licenses is the same as on real estate. Collector's fees, \$1.00. 2) Merchants' licenses run from Jan. 1. to Jan. 1. 3) If a merchant begins business after the first Monday in Jan. of any year his license would run to the following Jan. 1. 4) The bond of a merchant must be delivered to the Collector at the time November 25, 1946 license is issued. 5) If a merchant does not obtain and pay for a license for 5 consecutive years immediately preceding application for license for the current year, he must deliver a bond to the Collector at the time he obtains his license.

Honorable Hazel Palmer
County Collector
Pettis County
Sedalia, Missouri

Dear Miss Palmer:

This will acknowledge your letter requesting an opinion, respecting the procedure to be followed under House Bill #536 of the 63rd General Assembly. Your letter is as follows:



"Will you please give me an official opinion from the Attorney General's Office upon the following questions relative to the twenty-eight new sections enacted in lieu of Article 18, Chapter 74, Revised Statutes of Missouri, in these particulars, to-wit:

"How much shall the County Collector charge for Merchants' License? It was \$1. Now it seems it can be \$1 or 75¢.

"When is the License due? Formerly they issued from June to June.

"Do Licenses run from January 1 to January 1? - unless the person starts in business after that date, and then does the License run to the following January 1, or does it run for one full year from the date the License was issued?

"Shall the Bond be executed and delivered to the Collector at the time the License is issued?

"If a person was in business for six years but during that time was out of business for one year, does that break

the 'five continuous years' provision in Section 11306 and require him to furnish bond?

"Thank you kindly for your official interpretation of these questions already promoted by the merchants of Pettis County. I wish to proceed under the new provisions strictly according to law, and do not wish to require something of the merchants that will not be followed the same way next year."

The delay in complying with your request was occasioned because there was later introduced, and the Legislature passed, House Bill #998, amending Section 11306 of said House Bill #536, and the later Bill was not finally passed until the late summer or early fall.

The questions you submit for an opinion are:

1st.: How much shall a County Collector charge as an ad valorem tax on merchants.

2nd.: Do merchants' licenses run from January 1st to January 1st.

3rd.: If a license is taken out after January 1st does it run until the following January 1st, or for a full year from the date of issuance.

4th.: Shall the bond required be executed and delivered to the Collector at the time the license is issued, and

5th.: If a person has been in business for six years but was out of business for one year during the six years does that break the "five continuous years immediately preceding an application" for a license for the current year, and require such person to furnish a bond.

Our opinion as to your question number 1 is that the rate of tax to be collected from a merchant is governed

by Section 4(a) of Article X of the new Constitution and House Bill #536, now a part of the statutes of this State. Section 4(a) of Article X of the new Constitution is as follows:

"Sec. 4(a). Classification of Taxable Property--Taxes on Franchises, Incomes, Excises and Licenses.--All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

It will be observed that in said Section 4(a) of said Article X, real estate is placed in Class 1.

Section 11305 of said House Bill #536 is, in part, as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; * * *".

Thus we observe that the value or rate of ad valorem tax assessed against merchants shall be such sum as may be levied by the County Court on real estate as may be provided by law. In other words, whatever rate of tax is levied against real estate the same rate must be used in fixing the rate for merchants' license taxes. This has long been the law of this State. House Bill #536 still adheres to that practice. The case of State ex rel. vs. Alt, was

before our Supreme Court on the question whether merchants were liable for a property tax or merely a license or occupation tax. The case is reported in 224 Mo. Rep. 493. The Court in holding that the laws relating to merchants' tax in effect provided for a property tax, although ostensibly, merely a license or occupation tax, l.c. 507, 508, said:

"* * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

It appears from your letter that you are making inquiry respecting the amount of license tax a merchant should pay for his license. We, therefore, went to some length to give our opinion respecting that feature. However, it may have been that you intended to inquire only about the fee your office should collect for issuing such license. If that be your purpose, we refer you to Section 11314 of House Bill #995, recently passed by the Legislature, which is as follows:

"The collector shall, at the time of delivering such license, collect the sum of fifty cents, the fee herein allowed to the clerk for issuing the same, and twenty-five cents each for the bond and statement to be retained by the collector as his fee for furnishing the

same; provided that, in counties of the first class any fees provided for herein, received by the collector shall be paid into the county or city treasury, as provided by law."

This will outline your charges for issuing a license and for the bond and statement so that we believe you will have no difficulty in the matter if that be the object of your inquiry. We believe this will answer your first question.

Replying to your second question, whether the license runs from January 1st to January 1st, we think the new Section 11306 of said House Bill #998 answers this question. Said Section 11306 is, in part, as follows:

"Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety, conditioned that he will on or before the 31st day of December following, pay to the collector of the proper county all merchants tax due, which bond shall be approved by the collector and his approval indorsed thereon: * * * ".

The part quoted provides for the giving of the bond to pay the tax due by the end of the following December. Such language indicates that the Legislature intended that the license should run from January 1st to January 1st or for whatever time of the year after the first of the year a person began business, and that his license and bond would run from that time until the next succeeding January 1st. There is no language or provision in any of the sections of either House Bill #356 or House Bill #998, as we read them, justifying the idea that if a person began business after January 1st of any year, say May 1st or June 1st, that his license and bond would run a full year to the corresponding month of the succeeding year. We believe Section 11328 of said House Bill #998, on the contrary, fully clarifies this question, and requires that the license and bond shall run from whatever time in the year they are executed

and delivered to the first of January next succeeding.

Said Section 11328 is as follows:

"When any merchant shall commence the business of merchandising in any county in this state after the first Monday in January, in any year, he shall execute a bond as provided for in Section 11306, conditioned that he will furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay a tax based upon the same rate as other merchants, to be determined by the number of months in business in any calendar year."

See also Section 11308 of House Bill #536.

This, we trust, will answer your question number two.

Replying to your third question and referring again to said Section 11328, supra, it seems to be clear that the Legislature intended that a merchant beginning business after the first Monday of January in any year should execute his bond at the time the license would be issued. Manifestly, he could not engage in business without the license, and the language, in part, of said Section 11328, supra, stating that, at the time he shall commence the business of merchandising he shall execute his bond, makes it plain, we think, that the merchant shall execute his bond and deliver the same to the Collector at the time the license is issued to him. We think this will answer your third and fourth questions, since the same provisions of the statutes quoted refer to both the period of time for which the bond and license may be issued, and also to whether the bond must be executed at the time the license is issued.

Replying to your fifth and last problem, we refer again to Section 11306 of House Bill #998, and the proviso thereof, which is, in part, as follows:

"* * * Provided that said bond shall not be required where any person, corporation or copartnership of persons has obtained and paid a license as required by law for a period of five continuous years immediately preceding an application for a license for the current year; * * * ".

This question calls for the construction of the language used in said proviso of Section 11306, supra. It would not appear to be difficult to give the ordinary meaning and interpretation of words to the language in said proviso. The proviso states that bond shall not be required where any person, corporation or copartnership of persons has obtained and paid a license, as required by law, for a period of five continuous years immediately preceding an application for a license for the current year. This could only mean that if such person, corporation or copartnership of persons had not obtained and paid a license for a period of five continuous years immediately preceding the application for a license for the current year, such person, corporation or copartnership of persons would be required to execute the bond required by law. In other words, if there had been a period of one year at any time within the five year period immediately preceding an application for a license where and when the person, corporation or copartnership of persons applying for a license for the current year had not obtained and paid a license he or they undoubtedly would be required to execute the bond required by law. This, we believe, will answer your fifth and last inquiry.

We believe said House Bills #536 and #998 provide such a plan of procedure respecting merchants' licenses and bonds as will permit the County Collectors to fix the periods for which both bonds and licenses shall run to be from January 1, of each year, to January 1 of the next succeeding year. This would, as we see it, permit the County Collectors of the several counties of this State and the merchants to depend upon a regular date and plan of complying with the recent statutes on the subject.

CONCLUSION.

It is, therefore, the opinion of this Department, considering the foregoing premises that:

1) The same tax rate shall be charged on the valuation of merchants' stocks for licenses as may be fixed by law for real estate. Collector's fee fifty cents for license, twenty-five cents each for bond and statement, total of \$1.00.

2) That merchants' licenses would run from January 1 of any year to January 1 of the next succeeding year.

3) If a merchant began business after the first Monday in January of any year his license would not run for a full year from its date, but only to the following January 1st of the succeeding year.

4) That the bond of a merchant should be, under the above cited and quoted statutes, executed and delivered to the Collectors of the several counties of this State at the time a license may be issued to any such merchant.

5) That if a person was in business for six years but during that time was out of business for one year, and did not obtain and pay for a license for a period of five continuous years immediately preceding an application for a license for the current year, such person would be required to execute and deliver a bond to the County Collector of any county in this State at the time of obtaining a license for a current year.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

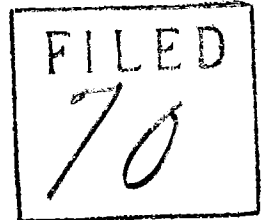
J. E. TAYLOR
Attorney General

GWC:ir

26
OFFICERS:
COUNTY TREASURERS:

RE: Treasurer cannot receive extra compensation
for taking care of accounts of county toll bridges.

January 8, 1946



Mr. Hugh Phillips, Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department relative to the payment of compensation to the treasurer of Camden County for handling the records and accounts and, in general, taking care of the Hurricane Deck Bridge Funds. The questions presented by your letter are:

"May the County Court lawfully pay the County Treasurer out of the funds received from the tolls on the bridge reasonable compensation for her services rendered in this special trust capacity?

"May the County Court also now pay the County Treasurer a reasonable compensation for her services rendered in the past out of the tolls received from the bridge?

"Could the County Court lawfully designate and appoint the County Treasurer or some other person as secretary-treasurer for the Toll Bridge Fund and as such pay a reasonable compensation therefore out of the revenue received from the bridge?"

Under date of November 19, 1941, this office wrote an opinion to Honorable Marion Robertson, Prosecuting Attorney of Saline County, Missouri. Mr. Robertson desired to know whether the county treasurer of Saline County was entitled to a salary, in addition to his statutory allowance as treasurer, for taking care of the accounts of the Saline County-Miami Bridge Fund. This department held that the county treasurer of Saline County could not receive additional compensation for performing these duties.

We are of the opinion that the same legal issue presented in our

former opinion is raised by your letter. We think that our former opinion, therefore, answers questions 1, 2, and part of question 3 of your letter, so far as the county treasurer is involved. We enclose a copy of this opinion for your examination.

There remains the question of whether the county court could lawfully designate a person other than the county treasurer to manage the accounts of the toll bridge fund and pay such person a reasonable compensation therefor.

Section 8548, R. S. Mo. 1939, which prescribes the methods of financing, acquiring and constructing toll bridges, and under which the Hurricane Deck Bridge was constructed, is set out in full on page 3 of the accompanying opinion of this department. It provides no express statutory authority for the appointment of some particular person to act as secretary-treasurer of any toll bridge fund. Further, its provisions, we think, plainly indicate that the public agency (in this case the county) is to have charge of all affairs regarding the bridge from the acquisition of funds for the purpose of constructing or acquiring such bridge down to the operation and maintenance of the bridge. Since the county is to take complete charge of the bridge and the funds therefrom, and the statute makes no provision for the appointment of other persons to aid the county officers in performing any of the duties which may become necessary, we think it becomes the exclusive duty of the county officers to perform the functions necessary to the operation and maintenance of the bridge which are consistent with the general nature of their official duties. In *Louisville Bridge Commission vs. Louisville Trust Company*, 81 S. W. (2d) 894, the Supreme Court of Kentucky held that the funds collected from a toll bridge were public funds. It is the duty of the county treasurer to manage and have the custody of the public funds which are under the control and management of the county. Our own Courts, in ruling on questions arising under sections 8547 and 8548, R. S. Mo. 1939, have considered toll bridges constructed under authority of those sections as bridges owned by the counties. In *State ex rel St. Charles County v. Smith* (1941) 348 Mo. 7, 15; 152 S. W. (2d) 1, the Missouri Supreme Court pointed this out by saying:

"The county acquired, and has ever since owned and operated the toll bridges in question under the provisions what are now Secs. 8547, 8551, R. S. Mo. 1939 (Sess. 7907-c--7907-g, Mo. Stat. Ann.) enacted at the extra session of 1933-34 (Laws 1933-34, Ex. Sess., p. 115)."

Also, *Lancaster v. County of Atchison* (1944) 352 Mo. 1039.

We think, therefore, that the custody and management of the Hurricane Deck Toll Bridge Fund is a duty incidental to the office of the county treasurer of Camden County.

CONCLUSION.

We are, therefore, of the opinion that the county court of Camden County may not lawfully pay the county treasurer, out of the funds received from the tolls on the Hurricane Deck Bridge, a reasonable compensation for her services rendered in regard to the Hurricane Deck Bridge Fund, and that compensation may not be granted for such services which have been rendered by her in the past.

We are of the further opinion that the County Court of Camden County may not lawfully designate and appoint the county treasurer or some other person as secretary-treasurer for the toll bridge fund and, as such, pay a reasonable compensation therefor out of the revenue received from the Hurricane Deck Bridge.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

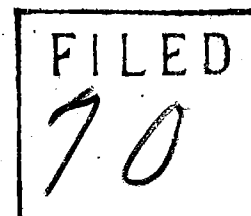
J. E. TAYLOR
Attorney General

SNC:dc
(Enc.)

MERCHANT'S TAX:

Corporation which consigns goods to a second corporation for storage and delivery only is liable under Section 11305, R.S. Mo. 1939, for a merchant's tax.

March 18, 1946



Honorable Elmer Peal
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Mr. Peal:

This Department is in receipt of your request for an official opinion, which reads as follows:

"We have in Pemiscot County some large storage tanks owned by the Refiners Relay Corporation, used for the storage of gasoline, which is shipped by river to this terminal and owned by the Texaco Products Co., but consigned to the Refiners Relay Corporation for storage and distribution over South East Missouri and North East Arkansas by its trucks, and is billed to the customers by Texaco.

"The refiners Relay only gets delivery or dray tickets signed upon delivery of the gasoline. Refiners Relay maintain that they act as carrier and storage for the Texaco Company. They also contend that they are liable for any Merchant's Tax.

"Should the gasoline be assessed to Texaco with office in Chicago, for this merchandise, or should the Refiners Relay be assessed to whom the gasoline is consigned?

"I wish you would give me an opinion on this matter as we want to be sure of our procedure. I am, "

March 18, 1946

Section 11305, R.S. Mo. 1939, provides as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

A merchant is defined by Section 11303, R.S. Mo. 1939, as follows:

"Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

From the facts presented in your request it appears that the gasoline is owned at all times by the Texaco Products Company, and all gasoline sold is paid for by the customers direct to said company. The Refiners Relay Corporation at no time exercises any ownership over the gasoline but only store it for the Texaco Company, and deliver it to the customers of the Texaco Products Company.

This tax is one upon the stock in trade not upon the occupation, and it is, therefore, a personal property tax. State ex rel. The Board of President and Directors of the St. Louis Public Schools vs. Tracy, 94 Mo. 217, 6 S.W. 709.

In *City of Troy vs. Harris*, 102 Mo. App. 51, 76 S.W. 662, the city of Troy, Missouri, had enacted ordinances which are identical with Sections 11303 and 11305, *supra*. The facts in issue, as shown by the opinion, l.c. 55, were as follows:

"The evidence of various persons tended to prove that the Standard Oil Company, a corporation of the State of Indiana, but authorized to do business in this State, owned tanks of oil near a railroad station in the limits of the city of Troy, of which oil the defendant Harris was in charge. He had the keys to the premises and opened and locked the gate. As the agent of the Standard Oil Company, he sold oil to different persons within the time charged in the complaint, both from stationary tanks and from a wagon-tank which he drove about town. When Harris was paid he gave a receipt for the money in the name of the Standard Oil Company. There was no proof as to the scope of his agency, the extent of his authority, or whether he worked for a salary or for a commission."

The Court, l.c. 58, held that: "The business carried on by the Standard Oil Company is shown by the testimony to be such as brings it within the definition of a merchant contained in the first section of the ordinance, which is similar to the statutory definition. R.S. 1899, c. 89, sec. 8540; *State v. Vindquest*, 36 Mo. App. 584; *Kansas City v. Lorber*, 64 Mo. App. 604; *Kansas City v. Guest*, 151 Mo. 128. It is therefore amenable to any reasonable requirement in regard to a license and a license tax."

In *the Town of Canton vs. McDaniel*, 188 Mo. 207, 86 S.W. 1092, the defendant, McDaniel, had shipped goods to one Ray, who was a grain merchant in the city of Canton, and Ray was to hold the goods until they were called for by the persons to whom they had been sold. The Court held that McDaniel was a merchant under ordinances identical to the statutes here involved, and was liable for an ad valorem tax upon his goods, and that Ray was only an agent even

March 18, 1946

though in this case Ray had collected the money for the goods.

It will be seen therefore, that the Texaco Products Company is the owner of the goods in question, and is a corporation dealing in the selling of goods, wares and merchandise, and that the Refiners Relay Corporation is merely an agent of the Texaco Products Company for the purpose of storing and delivering the gasoline.

CONCLUSION.

It is, therefore, the opinion of this Department that a corporation who ships gasoline into the state to a person for storage and for delivery to customers of the corporation who are billed by said corporation, is a merchant within the meaning of Section 11303, R.S. Mo. 1939, and must pay the ad valorem tax upon the merchandise as required by Section 11305, R.S. Mo. 1939.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

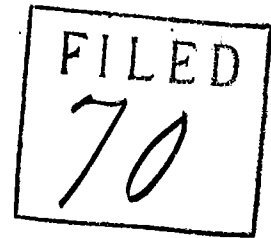
APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

LANDS: Federal Government may acquire land in Missouri without the consent of the State for public use.

April 2, 1946



H-12

Honorable C. Vern Peak
House of Representatives
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for our official opinion on the following question:

"May the State of Missouri prohibit the Federal Government or any of its agencies from acquiring land in Missouri by cession, purchase, condemnation or otherwise?"

The constitutional authority pertaining to the right of the Federal Government to acquire lands within the various states which is cited most frequently in decisions on this question is Clause 17, Section 8, Article I, of the Constitution of the United States, Section 8 being a grant of powers to Congress, which is as follows:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; * * *"

It should be noted that the above clause contains no express authorization for the exercise of the power of eminent domain, and it is through decisions of the Supreme Court of

the United States that such powers have been attributed to the Federal Government.

In pursuance to the constitutional provision above noted, the General Assembly enacted (and reenacted in 1935) Section 12691, R. S. Mo. 1939, giving the consent of the State to the acquisition of lands for the following purposes:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

The consent given by the State of Missouri is much broader than the power of acquisition listed in the constitutional provision to which the above section refers. That consent, however, corresponds to the powers given the Federal Government by judicial interpretation.

The leading case on this question is Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264. In that case the question of the legislative authority of the Federal Government over the area comprising Fort Leavenworth, Kansas, was under discussion, and while the Supreme Court of the United States in that decision admitted that the framers of the Federal Constitution were of the opinion that the new Government could not acquire land in any State without the consent of such State, yet the Federal Government was held to have such power, in the following language, 1. c. 266 (L. Ed.):

" * * * It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings

for the defense of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the General Government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

"But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using these terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the Constitution; and that the General Government is not dependent upon the caprice of individuals or the will of State Legislatures in the acquisition of

such lands as may be required for the full and effective exercise of its powers. This doctrine was authoritatively declared in *Kohl v. U. S.*, 91 U. S. 367 (Bk. 23, L. ed. 449). * * * * *

"When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all state authority. * * * * "

There appears to be but one restriction on the right of the Federal Government to acquire land within this State by the right of eminent domain, and that is that the land must be acquired for a public use. The rule is briefly stated in *United States v. Certain Lands in City of Louisville, Ky.*, 78 F. (2d) 684, 1. c. 686, as follows:

"The government of the United States is one of delegated powers. There is no constitutional provision expressly authorizing it to exercise the power of eminent domain. It is nevertheless well settled that this power belongs to the government as an attribute of its sovereignty. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *Shoemaker v. United States*, 147 U. S. 282, 299, 13 S. Ct. 361, 37 L. Ed. 170; *Chappell v. United States*, 160 U. S. 499, 509, 510, 16 S. Ct. 397, 40 L. Ed. 510. Equally well settled is it that the right can only be exercised where the property is to be taken for a public use. * * * * "

The refusal of a State to give its consent to the acquisition of land by the Federal Government has only one effect, and that is to deny exclusive legislative jurisdiction to the Federal Government over such land, and that is subject to the further qualification that State legislative enactments may not interfere with the governmental use of such land. This rule is clearly set out in several decisions, but, for the purpose of brevity, we are quoting only from *Chicago, Rock Island and Pacific Ry. Co. v. McGlinn*, 114 U. S. 542, 29 L. Ed. 270, 1. c. 271:

" * * * But, in order that the United States may possess exclusive legislative power over

the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express Act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended.
* * * "

And the more recent case of James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 1. c. 165:

"It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl v. United States, 91 U. S. 367, 371, 372, 23 L. ed. 449, 451. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses.
* * * "

Federal decisions have been very liberal in the interpretation of the words "public use" and have extended the words to include reforestation, prevention of soil erosion, flood control, wildlife conservation, and the retirement of sub-marginal lands or lands not suited primarily for conservation. A recent decision by a Federal District Court, In re United States, 28 F. Supp. 758, has summarized the various meanings given to the words "public use" in the following language, 1. c. 763, 764:

"It is clear that Forestation, prevention of soil erosion and flood control have come

to be recognized in the mind of Congress as public necessities if we are to conserve our natural resources. Little question could be raised regarding the authority of the state to fulfill any of these programs. Likewise there can be no doubt that forestation, and flood control on even minor streams, and control of soil erosion even over a comparatively small area affect an interest which is 'national and general as contradistinguished from local or special.' The nature of the program for wildlife-reforestation projects indicates an activity involving a scope much more extensive than a single state. * * *

" * * * There can be no doubt that projects looking to flood control, re-forestation and prevention of soil erosion may in and of themselves affect that 'general welfare.' As to the establishment of game refuges there can be little doubt under any circumstance. It is quite possible that these projects for re-forestation and conservation and flood control may seem to affect only streams and lands within the particular state; that they are local only. But that seldom so results. Further, the projects are not to be considered separately but as part of the entire program contemplated by the acts. These activities may well be and are in aid of the 'general welfare' and hence in the 'public interest,' irrespective of the demands of the economic interests of the country. * * * 'The authority to condemn * * * extends to every case in which an officer of the government is authorized to procure real estate for public use.' Hanson Lumber Co. v. United States, 261 U. S. 581, 43 S. Ct. 442, 444, 67 L. Ed. 809.

"Counsel for the State with ability has traced the history of the State relative to the powers reserved to the states in the Confederacy of States, and later under the Federal Constitution. The question here obviously is whether the authority sought to be asserted is within such reserve powers. The answer is found

in the decisions of the Supreme Court that 'the general government is not dependent upon the caprice of individuals, or the will of state legislatures, in the acquisition of such lands as may be required for the full and effective exercise of its powers.' Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 530, 5 S. Ct. 995, 998, 29 L. Ed. 264, and other cases hereinbefore cited. The projects in question are necessary for the 'full and effective exercise' of the powers of the United States."

CONCLUSION

It is, therefore, the conclusion of this office that the United States Government may acquire land within the State of Missouri for public use without the consent of this State, by purchase or by exercise of the right of eminent domain, and that acquisition for public use would include reforestation, soil conservation, wildlife conservation, and flood control projects. It is our further opinion that the Federal Government may acquire exclusive legislative jurisdiction over such land only with the consent of the State of Missouri, and that in the absence of such consent, the territory acquired is subject to the general laws of the State of Missouri, so far as they do not interfere with the exercise of governmental functions by the Government of the United States.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

TAXATION AND REVENUE: Necessity of inclusion of name of owner in publication for sale of real property for delinquent taxes.

September 6, 1946



Honorable Elmer Peal
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Will you please inform me if the publication of sale of real property by County Collector for the collection of delinquent taxes requires the name of the owner of said property to be set out in the publication, along with the description of the property."

The following provision is found in the Constitution of 1945, appearing as Section 13 of Article X:

"No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

To conform with the constitutional provision quoted supra, the 63rd General Assembly has passed H.C.S.H.B. 537. This Act repealed Section 11125, R. S. Mo. 1939, and reenacted a new section bearing the same number. The newly enacted section reads, in part, as follows:

" * * * No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall

Honorable Elmer Peal - 2

contain the names of all owners appearing
on the land tax book. * * * "

H.C.S.H.B. 557 was approved by the Governor on the 5th
day of December, 1945. It carried an emergency clause and
therefore became effective upon that date.

CONCLUSION

In the premises, we are of the opinion that the publica-
tion of notice of sale of real property for delinquent state,
county or city taxes must include therein the names of all
owners of such real property that appear on the land tax book.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

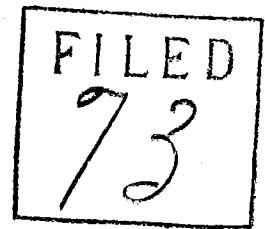
WFB:HR

SCHOOLS:

CONSOLIDATED DISTRICTS:

Consolidated and Common
School Districts may
consolidate.

March 29, 1946



H-4

Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Sir:

We acknowledge your request, which is as follows:

"The County Superintendent of Schools of this county desires advice concerning the formation of a school district, and I therefore request your opinion. The facts are substantially as follows:

"The tax rate in the Hillsboro Consolidated School District as it is now constituted is \$1.00, while the tax rate in the Common School District which the Hillsboro School District desire to absorb is 20¢. The Common School District which the Hillsboro District desires to attach has an enumeration of three children and an assessed valuation of \$50,000.00. No school is maintained in the Common School District, nor has there been any for several years. The children residing in the Common School District are transported to the Hillsboro School and are receiving their education there.

"Please let me have your opinion as to whether or not the Statutes will permit the Hillsboro Consolidated School District to completely absorb the Common

School District above mentioned.

"It would appear from reading Sections 10410 and 10485 that such a procedure is authorized. However, in view of some of the Court decisions, the legality of the procedure seems doubtful."

We construe your request to be, does the law authorize the consolidation of a Consolidated School District with an adjacent Common School District?

Replying thereto, you are referred to the law enacted by the 61st General Assembly, Session Acts 1941, page 545, which states:

"Adjacent city, town, or consolidated school districts, without limitations as to size or enrollment, or one or more of the above mentioned districts and one or more adjacent common school districts may be organized into a consolidated school district for the purpose of maintaining elementary schools and high schools. * * * * *

It appears that the above law answers your question, both as to the authority for the consolidation of the two districts and the procedure therein.

Conclusion.

It is our opinion that under the law the Hillsboro Consolidated School District and the Common School District adjacent thereto may be consolidated into one, if, as and when, the procedure is complied with.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

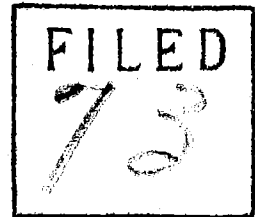
APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

AUTHORITY OF BOARD OF DIRECTORS : 1) May board of directors
OF CONSOLIDATED SCHOOL DISTRICT : buy property that is not to
be used for school purposes,
2) If they do will they be
personally liable.

April 19, 1946



Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Mr. Rasch:

We hereby acknowledge receipt of your letter
of April 10, 1946, requesting an opinion, which reads,
in part, as follows:

"The facts are substantially as follows: After the consolidation, the district had on hand a school site and building which it no longer needed and which it offered to the highest bidder. The highest bid was \$1300.00 offered by a returned veteran of World War II, but he asked one of the board members, a local banker, to check with a local abstract company as to the title before paying over the money. After a telephone call from the abstract company stating that the title was clear, a quit-claim deed was given the purchaser and the sum of \$1300.00 was paid to the school district and the amount credited to the building fund of the district. The quit-claim deed has not been recorded. Later the abstract company found a flaw in the title and the purchaser desires to tender back the deed and obtain his purchase money. The school district is willing to pay it back provided their action is legal and will entail no personal responsibility on the part of the directors."

The sale of the property has been completed, and
the proceeds from said sale have been credited to the

April 19, 1946

building fund. This would seem to be within Section 10471, R.S. Mo. 1939, which provides, in part as follows:

"* * * whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

Therefore, your opinion request resolves into merely a question of whether or not the board of directors of a consolidated school district may buy property which it does not intend to use for school purposes, and pay for said property out of the building fund.

Section 10348, R.S. Mo. 1939, provides, in part, as follows:

"Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, * * *".

Section 10366, R.S. Mo. 1939, as amended, page 893, Laws of Missouri, 1943, provides, in part, as follows:

"All school moneys received by a school district shall be disbursed

April 19, 1946

only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the President and the Secretary or Clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness."

In repurchasing the property in question with no intent to use it for school purposes we believe the board of directors would not be complying with the foregoing statutes, because they are not purchasing property for the purpose of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional ground adjacent to schoolhouse site or sites.

In Consolidated School Dist. No. 6 of Jackson County v. Shawhan et al., 273 S.W. 182, the Court held as follows:

"Powers of board of directors of school district are limited to those expressly delegated, and under Rev. St. 1919, Secs. 11159, 11223, in respect to application

April 19, 1946

of separate funds, directors are personally liable for misapplication of moneys in teachers' fund to purposes other than payment of teachers.

* * * * *

"Directors of school district are liable for misapplication of teachers' fund to purposes other than payment of teachers, notwithstanding it was done in good faith and without willful intention."

In State ex rel. Brickey v. Nolte, Circuit Judge, et al., 350 Mo. 842, 169 S.W. (2d) 50, the Court held as follows:

"An officer and member of school district board of directors occupies 'fiduciary relationship' to district,"

In School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 1.c. 138, the Court held as follows:

"Under section 11197, R.S. Mo. 1919, plaintiff district is constituted a body corporate and is capable of suing and being sued. * * *".

The property which the board of directors intends to purchase has been sold due to the fact that it was no longer needed for school purposes within the district. If the board of directors were to repurchase said property we believe their actions would be in direct conflict with the foregoing quotations of Court decisions which limit their powers as those expressly delegated by statute, and that they could be held personally responsible.

April 19, 1946

CONCLUSION

Therefore, it is the opinion of this Department that a school board of a consolidated school district does not have the authority to buy property which it does not intend to use for school purposes as set out by Section 10348, R.S. Mo. 1939, and

2) If a board of directors should attempt to do so, and pay for said property by drawing warrants on the building fund they could be held personally liable.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:ir

BARBER BOARD: }

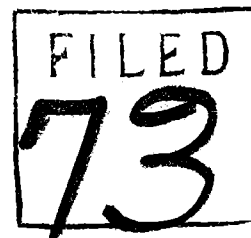
SCHOOLS: }

Public schools have right to teach barbering as vocational course without payment of fee as prescribed in Sec. 10134, R. S. Mo. 1939.

November 7, 1946

(Filed: #73)

Mr. Charles F. Quinlin, Treasurer
State Board of Barber Examiners
303 Frisco Building
906 Olive Street
St. Louis 1, Missouri



Dear Sir:

Your letter of recent date addressed to this office, requesting an opinion regarding the Washington Technical High School at St. Louis, Missouri, reads as follows:

"About two years ago the State Barber Board gave their permission along with other organizations in St. Louis for a Barber School to be operated at the Washington Technical High School, for colored, at 814 North 19th St., St. Louis, Mo.

"They promised the Board that they would comply with all the Rules and Regulations governing Barber Schools and to live up to our Barber Law and operate under the jurisdiction of the State Barber Board. This, they did not do. Permits were issued from this office to students until June 1st, 1946. The State Barber Board notified them that no more permits would be issued to them until they comply with the Missouri Barber Law.

"They started with eight chairs. At the present time, they are operating one there and are starting another one at Lafayette and Montgomery with ten chairs. The report came from the barber supply house that they have purchased over \$3000.00 worth of equipment. They are still operating without first complying with our law.

"We have an opinion from your office, stating that they would have to pay their \$100.00 to operate. This they have never done. The Barber Board of Examiners is asking you for an opinion, whether or not the School Board has a right to teach barbering as a study in their vocational training?"

The question presented therein is, "whether or not the School Board has a right to teach barbering as a study in their vocational training?"

We will first consider the nature and kind of school referred to in your request and what part it plays in the State Plan. The school referred to has reference to the Booker T. Washington High School of St. Louis, Missouri, for colored, which is a public school and is a part of the St. Louis public school system, having for its purpose, among other things, the teaching of vocational training in various trades. This being a public school, it necessarily follows that it is a political subdivision of the State of Missouri as defined by Section 15, Article X, of the Constitution of 1945, which reads:

"The term 'other political subdivision', as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."
(Emphasis ours.)

In the case of State ex inf. McKittrick, Atty. Gen. v. Whittle, 63 S.W. (2d) 100, the court said, at l. c. 102:

"Respondent next contends that a school district is not a political subdivision of the state. The authorities are to the contrary. It is defined by a standard text as follows: "A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instru-

mentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' 56 c. j. 193.

"This definition is approved by this court in State ex rel. Carrollton School Dist. v. Gordon, 231 Mo. 547, loc. cit. 574, 133 S.W. 44, 51, in which we said: 'A school district is but the arm and instrumentality of the state for one single and noble purpose, viz., to educate the children of the district; a purpose dignified by solemn recognition in our Constitution (section 1, art. 11 * * *), reading: "A general diffusion of knowledge and intelligence being essential to preservation of the rights and liberty of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years." In obedience to that constitutional mandate, the General Assembly has established such schools and given over to school districts, acting through boards of directors, the single duty and authority to maintain them.'

"In City of Edina to use v. School District, 305 Mo. 452, loc. cit. 461, 267 S.W. 112, 115, 36 A. L. R. 1532, we also said: 'Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function and not a special corporate or administrative duty. They are purely public corporations, as has always been held of counties in this State.'

Section 10525, as amended Laws of Missouri, 1941, page 553, in part reads as follows:

"That the provisions of the act of congress enacted by the sixty-fifth congress at the

second session thereof, entitled "An act to provide for the promotion of vocational education; to provide for cooperation with the states in the promotion of such education in agriculture and the trades and industries and home economics; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to authorize the appropriation of money and regulate its expenditures' * * * * *

Section 10527, as amended Laws of Missouri, 1941, page 549, reads as follows:

"That the state board of education is hereby designated as the state board of education as provided in such acts, is charged with the duty and responsibility of co-operating with the federal board for vocational education in the administration of such acts; and is given all power necessary to such co-operation. The state board of education in submitting plans for the training of teachers, supervisors and directors of agricultural subjects, and teachers of trade and industrial and home economic subjects, as required in such acts, shall provide that they shall be trained in the state teachers colleges of Missouri, the university of Missouri, or in a school maintained in a school district of a city of seventy-five thousand or more inhabitants, in so far as their training can be provided in schools."

Section 10529, as amended Laws of Missouri, 1941, page 549, reads as follows:

"That the state treasurer is appointed as custodian of funds for vocational education as provided in such acts; and is charged with the duty and responsibility of receiving and providing for the proper custody and for the proper disbursements on requisition

of such board of education of moneys paid to the state from the appropriations made under the provisions of such acts."

Section 10532, R. S. Mo. 1939, reads as follows:

"Any approved school, department or class giving instruction in agriculture, industrial, home economics, or commercial subjects shall be entitled to share in the Federal money, conditioned that for each dollar of Federal money expended for such salaries the state or local community, or both, shall expend an equal amount. The state board of education shall recommend to each session of the general assembly the amount of money which should be appropriated by the state for such allotments during each succeeding biennial period."

Section 10540, R. S. Mo. 1939, defines vocational training and, in part, reads as follows:

"(a) Vocational education shall mean any education of less than college grade, the controlling purpose of which is to fit for profitable employment."

Section 10542, R. S. Mo. 1939, reads as follows:

"The state board of education shall establish standards for the establishment and maintenance of such schools."

Section 10134, R. S. Mo. 1939, relating to barbering, provides for the training of barber students in barber schools and as apprentices in barber shops, and in part, reads as follows:

"Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber: * * * Provided, that any firm, corporation or person, desiring to conduct a barber school or college in this state, shall first secure from said board a permit to do so, and shall keep the same prominently displayed. * * * *"

(Emphasis ours.)

This section applies to specially organized barber schools and licensed barbers, but does not control or affect the teaching of the vocational trades in the public school system of this state. The public school, being a part of the educational system of this state and a political subdivision thereof, is an agency of the state, supported by tax money collected for that purpose. Likewise, the Missouri State Barber Board, being a creature of the Legislature, is an agency of the state. To impose a license upon a public school for the privilege of teaching a specific course in its vocational department, would be to impose a tax or license upon a state agency; and for one state agency to tax or license another state agency would be collecting from itself, thereby placing the state in the position of taxing and licensing itself.

This section provides for the licensing only of "any firm, corporation or person" to conduct a barber school, or barbering college; and a public school, not being a firm, corporation or person, does not fall within any of these classes, it being a part of the state educational system, and, in this instance, a part of the St. Louis Public School System supported by tax money collected from that district.

In the case of State ex rel. Missouri Portland Cement Co. v. Smith, State Auditor, 90 S.W. (2d) 405, the court said, at 1. c. 408-9:

"* * * If chargeable to the state and its agencies of the kind in question, it

would merely collect the amount thereof from itself, and then pay over to itself the amount so collected. * * *

In the case of City of Webster Groves v. Smith, 102 S.W. (2d) 618, the court said, at 1. c. 619-620:

"* * * Further the collocation of 'corporation' with the words 'individual,' 'firm,' 'copartnership,' etc., indicates that a private corporation and not a municipality was meant. In view of the foregoing considerations, the meaning commonly ascribed to the word 'corporation' both in popular usage and legal nomenclature and absence of language indicating a legislative intent to use it in a different sense we must assume it was used in its ordinary and commonly understood meaning and the assumption legitimately follows that had the Legislature intended to include a municipality in the act it would have done so by specific language to that effect. * * *

Reading that part of Section 10134, supra, relative to the licensing of any "firm, corporation or person" desiring to teach barbering, it is our opinion that if the Legislature had intended for this section to apply to public schools teaching vocational barber courses, it should have said so in specific language to that effect. But since it did not expressly so state, we must then accept these terms in their ordinary and commonly understood meaning, which we do not construe to include public schools, since public schools are not firms, corporations or persons, but are state agencies.

The question presented, as indicated in the foregoing part of this opinion, is limited to the single request as to whether or not this school has a right to teach barbering as a course in its vocational training. In writing this opinion it is not the purpose or intention of the writer to overrule our former opinion written July 5, 1946, to your Board, but, rather, to enlarge upon it. This former opinion would still apply if the school in question desired to have their students recognized by the Missouri State Barber Board.

Mr. Charles F. Quinlin

(8)

CONCLUSION

From the foregoing it is the opinion of this department that the Washington Technical High School, 814 N. 19th Street, St. Louis, Missouri, has the right to teach barbering as one of its vocational courses without being subject to the annual license fee as prescribed in Section 10134, R. S. Mo. 1939.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

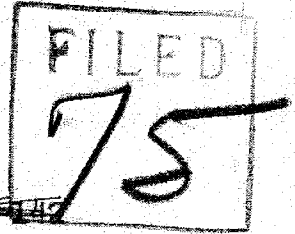
INSURANCE:
COUNTIES:
SPECIAL ROAD DIS-
DISTRICTS:

Neither the county court nor the commissioners of special road districts organized under Article 10, Chapter 46, R.S. Mo. 1939, are authorized to purchase liability and property damage insurance to insure injury, death or damage resulting from the operation of motor vehicles owned and used in the building and maintenance of the district or county, and there is no need for such insurance.

May 15, 1946

FILED 75

~~OPINION NO. 145~~



Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Riley:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this department, as follows:

"We respectfully request your opinion on the question of whether or not special road districts organized under Article 10, Chapter 46, R. S. Mo. 1939, or, if the county court may purchase public liability and property damage insurance to cover injury, death or damage resulting from the operation of motor vehicles owned and used in the building and maintenance of the public roads of the district or county.

The specific questions on which we desire your opinion are as follows:

1. Is the county or special road district authorized to expend public funds for the purchase of such liability insurance?
2. Is there any need for the county or the special road district to purchase such public liability insurance?"

This department wrote an opinion to Honorable J. P. Smith, Prosecuting Attorney of Webster County, under date of February 14, 1946, in which we answered the question of whether the county of Webster was authorized to purchase liability insurance covering injury or death to employees working on the public roads of the county, and whether there was any need for the county to purchase such insurance. We are of the opinion that the questions which you present in your letter raise the same legal propositions as we discussed in the above mentioned opinion.

In our former opinion we cite cases which clearly show that the non-liability of the county exists with regard to injury, death, or damage resulting to persons who are not employees of the county as well as to those who are employees of the county. We also cite cases showing that the same rules applicable to counties are also applicable to other political subdivisions of the state and to quasi political subdivisions of the state. The special road districts organized under Article 10, Chapter 46, R. S. Mo. 1939, which you specifically inquire about in your letter, are quasi political subdivisions of the state under the authority of *Lamar v. Bolivar Special Road District* (1918) 201 S. W. 890, 328 Mo. 867. In that case the court held that a special road district organized under the provisions of Sections 10433 to 10665, R. S. Mo. 1939, which sections now comprise Article 10, Chapter 46, R. S. Mo. 1939, is a quasi political subdivision of the county by saying: (l.c. 892)

"(1) We think it is evident that defendant (the special road district) is a quasi political subdivision of Polk County, Mo., and incidentally represents a similar position with reference to the state of Missouri. * * *"

A careful examination of Article 10, Chapter 46, R. S. Mo. 1939, including the amendments thereto contained in House Bill No. 795, passed by the 63rd General Assembly and approved by the Governor, and the case law has revealed no authority for the purchase of the insurance referred to in your letter.

We think, therefore, the opinion of February 14, 1946, is determinative of the issues presented by your letter. We enclose a copy of this opinion for your examination, and also a copy of an opinion to Honorable John W. Mitchell, Assistant Prosecuting Attorney, Buchanan County, which we referred to in the opinion of February 14, 1946.

CONCLUSION

It is, therefore, the opinion of this department, in conformity with our prior opinion, that (1) the county or a special road district, organized under Article 10, Chapter 46, R. S. Mo. 1939, is unauthorized to expend public funds

Hon. James T. Riley

-3-

for the purchase of liability insurance, referred to in your letter; (2) there is no need for the county or a special road district organized under Article 10, Chapter 46, R. S. Mo. 1939, to purchase such liability insurance.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

ELEEMOSYNARY INSTITUTIONS:

Validity of claims by state or county, for reimbursement for keep of patient as poor person at state hospitals, against estates of indigent patients.

May 10, 1946

FILED

76

5/14

Honorable Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This department is in receipt of your recent letter requesting an opinion on the following facts:

"As prosecuting attorney of Schuyler County, I have this question:

"Mary Arni, a resident of this county, was adjudged insane about a year ago. She had an interest in some real estate, and a small amount of personal property. The adjudication was by our probate court, and a guardian and curator was appointed, he being Mr. A. J. George of Queen City, Missouri.

"Some months after she was adjudged to be of unsound mind, she became more violent, and it became necessary for her to be confined in some hospital. She did not, at that time, have sufficient funds or estate to support her in any institution, except for a very short time. Her need for confinement to a hospital was very urgent. Her guardian went before our court and showed her financial condition, and showed the court that later she would perhaps have estate enough to pay her way, at least for a while. Our county court ordered her sent to State Hospital No. 1 at Fulton, Missouri, with the

agreement with the guardian that if and when she or her estate became so that it could, her guardian would reimburse the county and state. The guardian did pay the county the \$6.00 per month, which the county sent to the hospital. Miss Arni died March 30 of this year. A few days prior to her death her guardian obtained enough estate to more than pay what it would have cost to keep her in the hospital as a private patient.

"The guardian is willing to pay this if it is a legal obligation, or one which he could be made liable. He is making settlement as guardian, and making report of the situation as it is. A controversy has arisen between him and some of the heirs.

"Please let me know whether or not, in your opinion, the guardian should reimburse the county and state, and if so, how much he should pay, that is at what rate, and to whom such payment should be made."

Section 9328, R. S. A., provides that the County Court shall have the power to send poor patients to state institutions at the expense of the county.

Section 9335, R. S. A., providing the procedure to be followed in admitting county patients to the state institutions, is as follows:

"For the admission of county court patients the following proceedings shall be had: Some citizen residing within the county, of which the alleged insane person is a resident, shall file with the Clerk of the County Court of such county a verified statement in writing which shall be substantially as follows:

"State of Missouri)
) ss.
County of)

"The undersigned, a citizen residing in the county and state aforesaid, on his oath, according to his best information and belief states: that _____, a resident of the county and state aforesaid is insane; that his insanity is less than _____ year's duration; the said _____ has not sufficient estate to support him at a state hospital for the insane; that the said _____ (is or is not) so deranged as to endanger himself or others and _____ (will or will not) be dangerous to the safety of the community by being at large and that he _____ (is or is not) now being confined or restrained; and that the foregoing facts can be proved by _____ and _____ (naming at least two persons one of whom shall be a reputable physician).

"Dated this _____ day of _____, 19____.

"Subscribed and sworn to before me this _____ day of _____, 19____.

County Clerk."

The County Court is the only tribunal authorized to send patients to state institutions at the expense of the county, and in the exercise of this function it is the duty of the County Court to determine (1) the residence of the patient, (2) that he is insane and requires hospitalization, and (3) that he does not have sufficient estate to support himself at a state hospital for the insane.

In the case of *Ussery v. Haynes*, 127 S.W. (2d) 410, 1.c. 414, the court said:

"It will be seen that the statute gives the county court jurisdiction to inquire into the sanity of persons alleged to be insane and to adjudicate thereon, where it is sought to send such persons to a state hospital at the expense

of the county and it is the only court that has authority to order an insane person sent to a state hospital at the public expense. When, therefore, the statement required by Sec. 8643 was filed the court was vested with jurisdiction of the subject matter. * * * *

When the County Court exercises its power and determines a patient does not have sufficient estate, that finding is final and conclusive until otherwise changed by the County Court. In the case of *The State ex rel. Yarnell v. The Cole County Court*, 80 Mo. 80, 1.c. 82, the court said:

"The statute authorizing a pay patient confined in the asylum to be made a county patient, provides as follows: 'If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate under seal setting forth that any patient in the asylum has not sufficient estate to support him at the asylum. Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided in the cases of poor patients.' R.S. 1879, Sec. 4140. As this section conferred jurisdiction upon the county court over the subject matter, and invested it with full power to make a pay patient a county patient, the order made by the court and offered in evidence cannot be said to be a nullity. It may be irregular, but that does not make it void. It is the fact that the pay patient has not estate sufficient to support him at the asylum that authorizes the county court to make him a county patient, to be supported at the expense of the county; and we can indulge the presumption that the court found this fact to exist and based its order upon it. This order, if certified to the superintendent, would be as binding on the county as a certificate of the clerk stating that he had been ordered by the court to certify that such pay patient had not estate sufficient to support him."

It is our opinion that when the County Court makes its finding that the patient does not have sufficient estate to support himself that such order is binding upon both the county and the hospital, and before the institution can consider the patient otherwise than a county patient his status must be changed by the County Court under Section 9347, R.S.A., which provides as follows:

"If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

The status of the patient mentioned in your letter was never changed from that of a county patient to that of a pay patient, and it is our opinion that the State could not recover any moneys above the amount paid by the county for her keep.

In answer to your next question, as to whether or not the county could recover the money appropriated for the keep of this patient at the hospital, we refer you to Section 500, R.S.A., which is as follows:

"In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and

also the county may recover the amount of said appropriations from the estate of such insane person."

Section 500, supra, was amended in 1927 by adding "and also the county may recover the amount of said appropriations from the estate of such insane person." Prior to this amendment, the Supreme Court held in the case of *Montgomery County v. Gup-ton*, 139 Mo. 303, 39 S.W. 447, and several other cases, that the county could not recover moneys appropriated for this purpose from the estates of indigent insane persons, that is, persons who were indigent at the time the County Court made the order committing them to the institution.

Since the amendment of this act in 1927, the Springfield Court of Appeals has held that the county could recover moneys thus appropriated, and in the case of *Barry County v. Glass*, 160 S.W. (2d) 308, l.c. 309, said:

" * * * * that provision was in full force and effect when Glass was confined in the State Hospital at Nevada, Missouri, as a county indigent patient, and, under that section, the estate of Charles W. Glass, an insane person, was clearly liable for the money previously paid out by Barry County."

Further in the opinion in this case the court discussed the application of the prior decisions of the Missouri Supreme Court, and said at l.c. 309:

"Plaintiff in error cites *Montgomery County v. Gup-ton*, 139 Mo. 303, 39 S.W. 447. All we need to say of the case cited is that it was decided in 1897 and before the Statute was amended so as to give the county a demand or claim against the estate of the insane person. What the Supreme Court held in that case, is well shown in paragraphs 1 and 2 of the syllabi of the 39 S.W. at page 447. The 1927 amendment, Laws 1927, p. 98, R.S. 1939, Sec. 500, supplied the very defect pointed out in the Gup-ton case. * * * *"

Honorable Allen Rolston

-7-

Conclusion.

It is, therefore, our opinion that the state or state hospital does not have a valid claim against the estate of this deceased person, but that the county does have a valid claim for reimbursement of the amount appropriated from the county funds for the keep of this patient and that the claim, when allowed for that amount, should be paid to the county.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

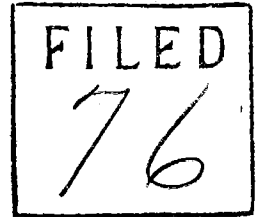
APPROVED:

J. E. TAYLOR
Attorney General

WED:ml

HIGHWAYS AND BRIDGES: Private citizens are responsible for removing an obstruction from a public road which was created by digging a drainage ditch across the road when they had not formed a legal drainage district.

October 14, 1946



Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department which reads as follows:

"Our County Surveyor has requested us to write you for an opinion on the following facts, to-wit:

"In the Arrow Rock Special Road District is an area of approximately 3000 acres, or less, that has a public road into it, which deadends into it--no other outlet.

"In 1944, as a private enterprise, various land owners of this particular acreage, cut a drainage ditch along the bluff in such way as to cut the public road that serves this area of land. They didn't form any legal drainage district, but got their money, and heads together and with some aid from the Government, cut the ditch.

"After the ditch was cut they came in and asked the County Highway Department to put a bridge across the ditch. We, the County Highway Department--maintain that it's the obligation of those parties who cut the ditch and cut the public road, to bridge it--no provision for a bridge was made by the land owners. We did loan them four (4) piling and enough lumber to span the creek with a temporary bridge. The temporary bridge washed out once and was replaced by the citizens, and a truck went through it on another occasion, broke the piling and it was also replaced by the

citizens with piling off the river. The renters particularly, and to some extent, the land owners, want us to build a substantial bridge so they can haul heavy loads, crops, etc. this fall. We want to know, is it our obligation to build a bridge or can we make them build it?"

As we understand your letter, the citizens who cut the drainage ditch across the public road did not form a corporation or legal drainage district, but merely proceeded as private individuals. It is under this premise that this opinion is being written.

In digging a drainage ditch across the road, an obstruction was created which is in violation of Section 8581 R. S. Mo. 1939, which provides:

"All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day

after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

Even though criminal proceedings were not brought under this section, it would still be possible to force them to either build a bridge or fill in the ditch. In the case of *Carson v. Baldwin et al.*, 144 U.S. (2d) 134, the Supreme Court said at l. c. 135:

"The common law condemns as a public nuisance any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes its use by the travelling public. * * *"

Since an obstruction on a public road is a public nuisance, this raises the question of who may bring proceedings to abate this nuisance. Declaratory of the rule that the prosecuting attorney may proceed in behalf of the state to abate a public nuisance, we quote from *State ex rel. Detienne v. City of Vandalia*, 119 Mo. App. 406, l. c. 418:

"* * * The Attorney-General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the State, for its abatement. This is the rule independent of any statute touching the matter, as has been adjudged in many cases. * * *"

The Supreme Court has upheld the ruling in the above case in *State ex rel. W. A. Thrash v. Fred Lamb*, 237 Mo. 437, wherein they stated at l. c. 455:

"Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond. * * *"

From the above quotations, it seems clear to us that the people referred to in your letter have created a public nuisance and the prosecuting attorney may bring proceedings to abate this nuisance.

Hon. Marion Robertson

(4)

CONCLUSION

Therefore, it is the opinion of this department that the people referred to in your letter, who were responsible for digging the drainage ditch across a public road, would have to remove the obstruction, either by building and maintaining a suitable bridge or by filling in the ditch.

Respectfully submitted,

WARREN G. PHELPS
Assistant Attorney General

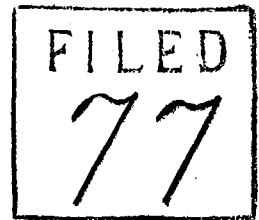
APPROVED:

J. E. TAYLOR
Attorney General

FW:VLM

STATE: IN RE: Approval of quit-claim deed to Project No. 23-127 F;
DEEDS located at Rolla, Missouri.

April 10, 1946



Honorable B. H. Rucker
Member, 63rd General Assembly
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for approval, by this department, of the enclosed quit-claim deed wherein the Federal Works Administrator, is conveying to the State of Missouri, Project No. 23-127 F, located at Rolla, Missouri.

Under and by virtue of the Public Law No. 849, Volume 54, Part I, Section 4, page 1125, United States Statutes at Large, the Federal Works Administrator is authorized to convey such project when the President of the United States shall have declared that the emergency, declared by him to exist on September 8, 1939, has ceased to exist. This, the President has not done.

Notwithstanding the President of the United States has not declared said emergency to no longer exist, we believe that the Federal Works Administrator may convey said project to the State of Missouri. We understand said project was acquired by virtue of Public Law 849, supra, therefore, under Section 7 of said Public Law, it provides that notwithstanding any other provision of law, the Federal Works Administrator, with respect to any property acquired or constructed under said Act, is authorized to sell same upon such terms as may be deemed by said Administrator to be in the public interest.

We construe the foregoing provisions of Public Law #849 to mean that it is mandatory that the Federal Works Administrator dispose of such projects acquired under said Act when the President of the United States declares said emergency to no longer exist, however, under Section 7 of Public Law 849, supra, the Federal Works Administrator may convey said projects at any time as in his opinion it may be in the public interest.

CONCLUSION

It is, therefore, the opinion of this department that, under Section 7, Public Law 849, supra, the Federal Works Administrator

Hon. B. H. Rucker

-2-

is authorized at this time to convey said Project No. 23-127 F, at Rolla, Missouri, to the State of Missouri. We also approve the enclosed copy of quit-claim deed as to form and substance. Furthermore under House Bill 960, as introduced in the 63rd General Assembly of the State of Missouri, if and when approved by the Governor of Missouri, this State will be authorized to purchase said project subject to the Federal Works Administrator, grantor herein, furnishing the State an Abstract of Title showing that the United States of America, grantor herein, holds a merchantable title to said project No. 23-127 F.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

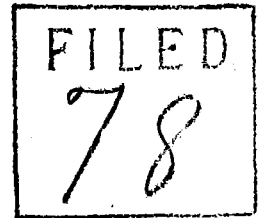
J. E. TAYLOR
Attorney General

ARH:mw
Enc:

SCHOOLS: Construing Section 10463, p. 889, Laws Mo. 1943.

January 25, 1946.

1/25



Honorable Roy Scantlin,
State Superintendent of Schools,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of December 5, 1945, requesting an opinion from this department, which reads as follows:

"This Department is confronted with the question of the proper interpretation of the laws of this state applicable to the apportionment of building aid to a consolidated school district as provided in Section 10463, Laws of 1939 (Amended 1943, House Bill 56 -- amendment does not apply to the question involved).

"The Couch Consolidated School District of Oregon County filed with this Department on November 20, 1945, an application for \$2000.00 building aid because of the abandonment of two elementary schools within the consolidated district. The Couch District of Oregon County has been a consolidated district for a number of years, made up originally of the Couch District together with seven outlying rural schools. In 1937-1938 this district erected a new central elementary building in accordance with plans approved by this Department, and because of the new building, abandoned the seven outlying schools within the consolidated district. The state apportioned to this district \$1000.00 for each abandoned school, or a total of \$7000.00 in 1938-29. In 1944 two additional rural schools joined the Couch consolidated district, in accordance with the provisions of the laws of this state on annexation and change of bounday lines. The board of education soon thereafter abandoned the two schools and provided transportation for all pupils to the central elementary building which was erec-

ted in 1937-38. The abandonment of these two schools is the basis of the board's request and application for \$2000.00 additional abandonment aid.

"Section 10463, R. S. 1939, provides for the apportionment of building aid to a consolidated school district in which a new central elementary building has been erected in accordance with the plans approved by the State Superintendent of Schools the sum of \$1000.00 for each rural school building abandoned on account of such new building. The new building in the Couch Consolidated School District was erected in 1937-38 prior to the time the two additional rural schools became annexed to the district. However, the new building was large enough to accommodate additional pupils or anticipated expansion. Because of the new building, the board of education found it possible to abandon the two additional schools annexed to the original consolidated district.

"I shall appreciate your advice and official opinion in answer to the following question:

"Has the State Superintendent of Schools authority under the provisions of Section 10463, Laws of Missouri, to apportion additional abandonment building aid at the rate of \$1000.00 for each school abandoned when a consolidated district annexes additional rural schools and abandons them because of a new central elementary building erected prior to the annexation of such schools?"

Your request involves the construction of Section 10463, p. 889, Laws Missouri, 1943, which reads:

"There shall be paid to any consolidated or enlarged school district in which a new central elementary building has been erected in accordance with plans approved for such aid by the

state superintendent of schools, the sum of one thousand dollars (\$1,000.00) for each rural school building abandoned on account of such new building. This amount shall be paid in the same manner as other state apportionment aid and at the time of the next annual apportionment, following the opening of school in the new building and the abandonment of the school building or buildings: Provided, however, that any consolidated district receiving building aid under the provisions of this section shall not at the same time or on the same building program received building aid under the provisions of Section 10499: Provided also, that a common school district formed in accordance with the provisions of section 10410, Revised Statutes of Missouri, 1939, shall constitute an enlarged district and be eligible for building aid as provided in this section, if the formation of such district results in the abandonment of two or more school buildings, and if the plan for its formation had the written approval of the state superintendent of schools and the county superintendent or superintendents of the county or counties in which the territory of the new district is located."

One of the primary rules of statutory construction is to ascertain and give effect to the legislative intent. See Wallace v. Wood 102 S. W. (2d) 91, 1.c. 95, 340 Mo. 452.

We think there is no question as to the purpose in enacting Section 10463, supra, it was to aid the consolidated or enlarged school district in the building of the new central elementary building. The plan for constructing said building must even first be approved by the State Superintendent of Schools before such funds can be allowed the said district. While it is true the state aid that the school district receives under said provision is not paid to the district prior to the completion of said elementary building, it is forthcoming soon thereafter and said fund goes into the building fund of the school district. There can be no question but that such money is taken into consideration by said school district and used for the purpose of defraying the cost of said construction.

In construing statutes, it is a well established rule that meaning should be given to every word in the statute, if possible.

In Section 10463, supra, it provides that there shall be paid to any consolidated school district, in which a new central elementary building has been erected, the sum of One Thousand Dollars (\$1,000.00) for each rural school building abandoned on account of such new building. This amount shall be paid in the same manner as other state apportionment aid, and at the time of the next annual apportionment, following the opening of school in the new building and the abandonment of the school building or buildings.

The courts have construed such words as "on account of" to mean "for", "because of" or "by reason of". In *McKeen v. Brooks*, 178 Pac. 745-746, 55 Mont. 483, the court, in construing a lease, held that the words "on account of" should be construed as "by reason of", and in so holding, said:

"The single question for decision is: Under what circumstances did the lessor agree to become liable to the lessees for the original cost of their improvements?

"It is clear that a sale of the premises of itself did not render him liable; neither did the fact that the lessees were disturbed in their possession. To fasten responsibility upon him, it required a sale before the expiration of the lease and a disturbance of the lessees' possession 'for or on account of said sale.' In the connection in which it is used, the word 'for' cannot be given any meaning whatever, but the phrase 'on account of said sale' furnishes the key to the solution of the question. As here used, it means 'by reason of' (6 Words and Phrases, 4968; *Brown v. German-American T. & T. Co.*, 174 Pa. 443, 34 Atl. 335), or 'as the direct and proximate result of' (1 Words and Phrases, Second Series, 546; *Houston & Tex. C. R. R. Co. v. Anglin*, 45 Tex. Civ. App. 41, 99 S.W. 897)."

In *Blackwell v. Memphis Street Railway Co.* 137 S.W. 486, 1.c. 487, 124 Tenn. 516, the court, in construing a statute of limitation, held that the word "for" as used therein meant "on account of" or "because of", and in so holding the court said:

"* * * Eliminating all irrelevant matter, in so far as this suit is concerned, and the legislation accomplished by sections 2769 and 2772 of the Code of 1858 was as follows:

"All civil actions for injury to the person shall be commenced within one year after cause of action accrued."

"The word 'for,' above used in connection with and preceding the words 'injury to the person,' can have no other meaning than on account of or because of injury to the person, and in this well-known meaning, the word 'for' is the connecting link which binds the statute, giving the parent

Hon. Roy Scantlin

a right to sue to the one-year statute
of limitations.* * *

In Evans Marble Co. v. International Trust Co., 60 Atl. 667-672, 101 Md. 210, the court, quoting from Webster's Dictionary, held that the word "about" means "with regard to," "on account of," "touching". In so holding, the court said:

"* * *Among the meanings of the word 'about,' as given in Webster, are 'concerning; with regard to; on account of; touching.'"

Therefore, by use of the words "abandoned on account of such new building" in Section 10463, supra, the Legislative intent must have been that such words should be construed to mean for or because of the construction of such new building. That said rural school building would not have been abandoned had such new elementary school building not been constructed.

Construing Section 10463, supra, without taking into consideration that provision as to when said money shall be paid, we would be inclined to hold that said money could be paid to the consolidated school district whenever a rural school in said school district was abandoned. But by using the following words:

"* * *This amount shall be paid in the same manner as other state apportionment aid and at the time of the next annual apportionment, following the opening of school in the new building and the abandonment of the school building or buildings. * * *

we are convinced that the Legislature fully intended that such money should be paid to the consolidated school district at the time of the next annual apportionment following the opening of the new elementary school building. If it had been the legislative intent to authorize such payment at any time in the future it would have been an easy matter for that body to have included in the Act words to that effect in clear and unambiguous language.

CONCLUSION

Therefore, it is the opinion of this department that the consolidated school district is not entitled to \$1,000.00 for each of

Hon. Roy Scantlin

-6-

the two abandoned rural schools recently joining said consolidated school district.

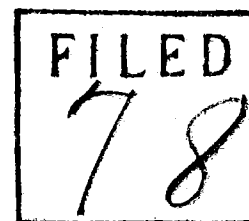
Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:mw



6/5
May 31, 1946

Honorable Roy Scantlin
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. Scantlin:

We hereby acknowledge receipt of your request for an opinion which reads as follows:

"House Bill No. 151 enacted by the 63rd General Assembly and signed by the Governor May 24, 1945, known as the Public School Retirement System of Missouri, is now in full force and effect. Beginning July 1, 1946, boards of education in this state, excepting the three large cities with their own local retirement systems, will be required to make contributions in support of the retirement system.

"Section 3, Part (1), of the Retirement Act provides that contributions shall be made in equal amounts by teacher members of the system and their board of education employers. Part (3) under Section 3 provides that the teacher's contribution shall be made through appropriate deductions from pay checks. Nothing is said in this act to indicate from what source or fund the board of education contribution shall come. The law merely provides that the employer shall contribute an equal amount to that withheld from the teacher's pay check.

"In the application of this law, many boards of education are asking for instruction as to the proper fund from which the employer's

contribution in support of the teacher retirement system shall be paid.

"There seems to be no question about the fund accounting of the teacher's contribution since teachers must be paid from the teachers' fund and their contribution is merely a withholding from the monthly pay checks. The employer's contribution is not in any way made for the payment of the teacher's salary. It is the district's contribution to the State's Public School Retirement System. Since this contribution is a fixed charge and regulated by the general laws of this state, it would appear to be a district expenditure from the incidental or rather general funds of the district. Generally accepted accounting procedures for school systems in the United States classify the school district's contribution for retirement support as a fixed charge. It is not classed as salary of teachers. In the fiscal report of the United States Office of Education, in its publication of financial data from the various states, specific instruction is given for accounting a school district's contribution to the Public School Retirement System as a fixed charge and not to be counted as salary of teachers.

"I find, in examining the laws of this state governing school fund accounting, nothing which would seem to prevent the board of education from counting the district's contribution to the Public School Retirement System a fixed charge and payable from the district's regular incidental fund account.

"Since boards of education are now planning their budgets for the ensuing fiscal year and the first contribution to be made will begin with the first month of the school year, July, 1946, it is necessary for school boards to be instructed promptly in regard

to this matter.

"I shall appreciate your advice and official opinion in regard to the following question:

"Will the board of education, in making its required contribution to the Public School Retirement System of Missouri, in complying with House Bill 151, Laws of the 63rd General Assembly, be making a proper and legal expenditure if payment is made from the school district's incidental funds as established by laws of this state? If not, from what fund would it be proper to make such contribution?"

Section 10366, Laws of Missouri, 1943, page 893, sets out the various funds of the school districts and provides:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the President and the Secretary or Clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness.

"The warrants drawn shall be in the following forms:

TEACHERS' FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, for teacher's services or tuition in district No. _____, _____ dollars, out of any moneys in your hands belonging to the teachers' fund of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____, Clerk.

INCIDENTAL FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, the sum of _____ dollars, for _____ furnished district No. _____ out of any moneys in your hands belonging to the incidental fund of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____, Clerk.

FREE TEXTBOOK FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, the sum of _____ dollars, for _____ furnished district No. _____ out of any moneys in your hands belonging to the 'Free Textbook Fund' of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____, Clerk.

BUILDING FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, the sum of _____ dollars, for _____ furnished in the repair, furnishing or erection of a schoolhouse in district No. _____, out of any moneys in your hands belonging to the building fund of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____ Clerk.

SINKING FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, the sum of _____ dollars, for the retirement of bonds of district No. _____, out of any moneys in your hands belonging to the sinking fund of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____ Clerk.

INTEREST FUND.

\$ _____ No. _____

Treasurer of _____ County, Missouri:

Pay to _____, or order, the sum of _____ dollars, for interest on the outstanding indebtedness of district No. _____, out of any moneys in your hands belonging to the interest fund of said district.

Done by order of the board, this _____ day of _____, 19____.
_____, President. _____ Clerk.

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'Teachers' Fund,' except as hereinafter provided. Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to the 'Incidental Fund'. Money apportioned for free text books shall be credited to the 'Free Text-book Fund'. All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the 'Building Fund'. Money derived from taxation for the retirement of bonds shall be credited to the 'Sinking Fund'. Money derived from taxation for the payment of interest on bonded indebtedness shall be credited to the 'Interest Fund.' Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed to the credit of the fund from which the original expenditures were made. Money donated to the school district shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board. No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. No partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that tuition shall be paid from

either the Teachers' or Incidental Funds if no part of the minimum guarantee is used for such purposes: Provided further, tuition and transportation costs shall be paid from either the Teachers' or Incidental Funds when the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law: Provided further that the Board of Directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that after all incidental obligations are paid, the board of directors shall have the power to transfer such portion of the balance remaining in the Incidental Fund to the Teachers' Fund as may be necessary for the total payment of all contracted obligations to teachers: Provided further that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund: Provided further, that when any school district has been disincorporated by state or federal agencies, the Treasurer for the school district, when directed by the County Superintendent of Schools, shall use the balances of moneys remaining in any or all funds to pay outstanding obligations of said district and shall transfer the unencumbered balance to the County Interest School Moneys for distribution as provided in Section 10390. No county, township, or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such fund in accordance with Section 10454, Revised Statutes, 1939. Reenacted, Laws 1943, p. 893, section 1."

The funds established by this section represent all school moneys and there is no mention of a particular fund from which any contributions should be paid into the Public School Retirement System of Missouri. In the enactment of H. B. 151 we must presume that in the absence of a particular fund for the payment of such contributions, the Legislature intended that they be made from one of the existing funds. To take any other view would render Subsection 1 of Section 3, H. B. 151 ineffective. The case of *Graves v. Little Tarkio Drainage District No. 1*, 134 S. W. (2d) 70 1. c. 78, 345 Mo. 557 states:

"* * it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.' State ex rel. Dean v. Daues, 321 Mo. 1126, 1151, 14 S. W. 2d 990, 1002. * * * * *

We must further presume that the Legislature enacted H. B. 151 with the full knowledge of the division of the school moneys and funds under which they were classified. It is held in the case of *State ex rel. Case v. Wilson*, 132 S. W. 625, 1. c. 627, 151 Mo. App. 723, that:

"* * in the passage of laws, the Legislature is presumed to know the existing state of the laws with which it deals at the time it acts, and is deemed to have dealt with the matter in the light of the state of the laws then existing. (*Sikes v. R. R. Co.*, 127 Mo. App. 326, 105 S. W. 700.)

Therefore, we may look to Section 10366, Laws of 1943, *supra*, to determine from which fund the contributions of the employer should be paid.

The funds which may be readily disqualified are those which are earmarked for a particular purpose, such as the Free Textbook Fund, the Building Fund, the Sinking Fund and the Interest Fund. This would leave the Teachers' Fund and the Incidental Fund.

Taking up first the Teachers' Fund, we find that by the statute it is to be used for the purpose of paying for teachers' services and tuition. If, therefore, it may be said that the retirement allowance to be received under H. B. 151 is a compensation to

teachers then this fund may be used for the contributions. If on the other hand the retirement allowance is a gratuity, the Teachers' Fund may not be used. In the case of *State ex rel. Heaven v. Ziegenhein*, 45 S. W. 1099, a legislative enactment authorized the payment of one-half of the last year's salary of policemen in the City of St. Louis on a per month pro-rated basis on retirement after twenty years' service. None of the funds for the payment of this pension came out of the salary of the policemen. The Supreme Court of Missouri held that the payments under the pension plan were mere gratuities. In so holding the Court said:

"* * * * We are not unmindful of the important services rendered by the officers of the police force, and of the benefits derived from their faithfulness in protecting and guarding the lives and property of the citizens. They are officers of the state, however, and the constitution has declared that, like all others holding official stations, they must rest content with the remuneration fixed by law; and after their services have been performed, no matter how valuable they may have been, the city cannot, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have not power to require it to be done. * * * "

This case would, therefore, tend to place Missouri in the line of jurisdictions which classify pensions and the like as gratuity and not as compensation. Cases from other jurisdictions which adhere to this rule are as follows: *Bd. of Trustees v. Schupp* (Ky.), 3 S. W. (2d) 606; *People v. Wright* (Ill.), 40 N. E. (2d) 719; *Pennie v. Reis*, 32 U. S. 464; *Jones v. Valentine*, 298 N. Y. Sup. 802; *State v. Rogers*, (Minn.) 91 N. W. 431.

Therefore, since the retirement allowances to be granted under H. B. 151 are not to be classed as compensation in Missouri but rather as gratuities it would be improper to use the Teachers' Fund, which as stated hereinbefore is to be used only for the purpose of compensation for teachers' services and tuition.

The only remaining fund from which the employer's contribution to their retirement system can be made is the Incidental Fund. As the title of this fund denotes, it is to be used for incidental purposes. Unlike the other five funds, the Incidental Fund is not earmarked for a particular purpose. If, therefore, H. B. 151 is to be given effect and operation in accord with the rule of *Graves v. Little Tarkio*

Hon. Roy Scantlin

-10-

Drainage District, supra, then we must hold that in the absence of the establishment of a particular fund for the payment of employers' contributions to the Public School Retirement System of Missouri, the only fund from which such contributions may be made is the Incidental Fund.

CONCLUSION

It is the opinion of this Department that in the absence of a particular fund for contributions to the Public School Retirement System of Missouri the Board of Education, under Subsection (1) of Section 3, H. B. 151, would be making a proper and legal expenditure if such contributions are made from the school district's Incidental Fund as established by Section 10366, Laws of Missouri, 1943.

Respectfully submitted

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:DA

SAVINGS AND LOAN ASSOCIATIONS: In re investments of funds by county courts in savings and loan associations accounts.

December 5, 1946



Division of Savings and Loan Supervision
State of Missouri
Jefferson City, Missouri

Attention: Mr. J. C. Woodsmall, Chief Examiner

Dear Sir:

This is to acknowledge receipt of yours of December 4, wherein you request an official opinion from this department in the following statement of facts:

"Wish you would advise my office if it is a legal investment for a County Court to invest in Savings & Loan Associations accounts under Section 59, House Bill 481.

"Call your attention to the wording of sub-section 4, 'and for any deposit by a public official in a depository',"

The investments of county courts to which you refer in your letter we assume consist of the county school funds and also school funds of townships. Senate Bill No. 162, passed by the 63rd General Assembly and approved on November 26, 1945, relating to such investments, makes the following provision relative to the investing of the county school funds and school funds of townships. Section 10376 of said Senate Bill No. 162 in the portion thereof relating to the investment of the county school funds provides as follows:

"* * * On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school

district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; * * *"

Section 10383 of said bill, relative to the investment of the township school fund, provides as follows:

"On and after the effective date of this act, all real estate loans and investments now belonging to the capital of the school fund of any township, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said capital of township funds, shall be reinvested in registered bonds of the United States, or in bonds of the State, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government; * * *"

Section 59 of House Bill No. 481 of the 63rd General Assembly, which was approved on March 12, 1946, and to which you refer in your letter, provides as follows:

"Accounts of any association doing business in Missouri, whether chartered by the State of Missouri or another state or the United States of America, and which (a) holds certificate of insurance from the Federal Savings and Loan Insurance Corporation or (b) has a contingent or general reserve fund of at least five per cent of its total assets as shown by its last preceding semi-annual financial statement, (1) shall be legal investments, without any order of court, for funds of administrators, executors, guardians, curators, trustees and fiduciaries of every kind and nature, regardless of whether such administrator, executor, guardian, curator, trustee or fiduciary be a natural person, unincorporated association or corporation and of whether the funds thereof be subject to the jurisdiction or orders of any court of this state or any court of the United States within this state; and (2) shall be legal

investments for funds of banks, trust companies, all types of insurance companies, credit unions, business and manufacturing companies, mortgage loan companies, loan and investment companies, cemetery associations, and corporations or associations for benevolent, religious, scientific, educational or fraternal-beneficial purposes; and (3) shall be legal investments for all types of public pension, endowment and scholarship funds, either federal, state or municipal; and (4) shall be eligible security for any state, county or municipal deposit and for any deposit by a public official in a depository, in any instance where security for such a deposit is required by law. The provisions hereof are supplemental to, and amendatory of, any and all other laws regulating, relating to, or declaring what shall be legal investments or security for any such funds."

It will be noted that there are three classes set out in this section which are authorized to invest in accounts of a savings and loan association. From an examination of these three classes, we do not think that capital school funds and township school funds which are invested by county courts are included.

In your letter, you refer to subdivision 4 of Section 59 and inquire whether or not the phrase "and for any deposit by a public official in a depository" would authorize county courts to invest in such accounts. Said sub-section 4 seems to relate more to securities for which the accounts of savings and loan associations may be used, and we do not think it relates to investments of county courts. The provisions of Senate Bill No. 162, referred to above, seem to limit the securities in which county school funds and township school funds may be invested. It is in the nature of a special statute on the investment of such funds. We think it would take a strained construction of the statute to hold that investments by county courts of the county school fund and township school fund could be made in the accounts of savings and loan associations under the provisions of said Section 59 of said House Bill No. 481.

The provisions of Senate Bill No. 162, hereinbefore set out, describing securities in which county and township school

funds may be invested, follow the provisions of Section 7 of Article IX of the Constitution of 1945, which provides in part as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. * * *"

According to the provisions of Section 59 of said House Bill No. 481, the accounts of a savings and loan association do not necessarily have to be guaranteed by the United States because, under sub-section (b) of the sentence relating to qualifications of accounts, it is provided that if the association has a contingent or general reserve fund of at least five per cent of its total assets as shown by its last preceding semi-annual statement that its accounts may be accepted for the investments described in that section or for securities described in sub-section 4 of that section.

We believe that this is the case in which the rule of statutory construction, namely "expressio unius est exclusio alterius," is applicable, and that only the securities mentioned in said Senate Bill No. 162 should be accepted as investments for county and township school funds.

CONCLUSION

It is therefore the opinion of this department that county courts would not be authorized to invest county and township school funds in savings and loan association accounts.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
Attorney General

TWB:VLM

BOARD OF CURATORS, LINCOLN UNIVERSITY:
RE: LENA MARTIN, CLAIMANT:

A devise for life with remainder to the heirs of the body is a contingent remainder, and a daughter of a remainderman who predeceased life tenant takes a share in the real estate.

August 10, 1946



8/
20

Mr. Sherman D. Scruggs
Acting Secretary
Board of Curators
Lincoln University
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the facts stated in a letter to your Board from Merrill and Enger, Attorneys at Law, Keytesville, Missouri. Their letter is as follows:

"We are writing to you because you are President of the Board of Curators of the Lincoln University, and we are representing Lena Martin, St. Louis, Missouri, in the matter of her claim to an undivided one-seventh interest in the land in Chariton County, Missouri, upon which Dalton Vocational School of the County of Chariton, State of Missouri, is located, and described as follows:

(description omitted)

"This land is claimed by the Lincoln University. The interest of our client, Lena Martin, is based on the following facts and records:

"This land was formerly owned by Louis Grotjan, great grandfather of Lena Martin. By the terms of his will, he left this land to his son, Albert Grotjan, during his lifetime and after his death to his bodily heirs. Albert Grotjan died a few months ago, and Lena Martin, his granddaughter, was his bodily heir by virtue of

the death of her father, Alonzo Grotjan, several years prior to the death of Albert Grotjan. Lena Martin was the only child of Alonzo Grotjan.

"While there was a sale of this land by the guardian and curator of the children of Albert Grotjan, including Lena Martin's father, several years ago, assuming that this deed was a valid conveyance of the remainder in this land, the fact that Alonzo Grotjan preceded the said Albert Grotjan in death, made Lena Martin, the only child of Alonzo Grotjan, the bodily heir of Albert Grotjan, within meaning of the law and the decisions of the State of Missouri, and she is claiming the undivided one-seventh interest in this land as bodily heir.

"We are writing to you because we do not know what law firm is representing the Board of Curators or Lincoln University, and feel sure you will refer this letter to your attorneys for we believe that this claim could be settled without the necessity of our going into Court with a suit in partition."

The question presented here deals with remainders. The life tenant and the potential remaindermen attempted to pass title to the grantee, Mary James, who later deeded the land to your institution. The quitclaim deed by the life tenant and the guardian and curator deed for the potential remaindermen were executed prior to the death of the life tenant. Before the death of the life tenant, one of the remaindermen had died, leaving a daughter who now claims an interest because she is an heir of the body of the life tenant.

Section 3500, Mo. R.S.A., provides that the persons determined to be bodily heirs of a life tenant at the termination of the life estate take a fee simple title, when the property is devised or deeded under conditions such as is presented by your request. Said section is as follows:

"Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them."

This section has been construed to mean that a devise of a life estate to one with remainder to the heirs of his body creates a contingent remainder and does not vest any interest in the remaindermen until the termination of the life estate, at which time the heirs of the body then living will take. In the case of *Emmerson v. Hughes*, 110 Mo. 627, 1.c. 629, 630, 631, 632, the court said:

" * * * * The cause was tried upon agreed facts, from which it appears that Elizabeth O'Bannon and her husband, by their deed, dated the twenty-sixth of October, 1868, conveyed the land to 'Mary R. Godman for and during her natural life, and with remainder to the heirs of her body,' * * *

"At the date of this deed, Mary R. Godman had six children living. It is agreed that she had then reached such an age as to render future issue impossible. She, her husband and the six children executed and delivered deeds conveying all their interest in the land, and the defendant Simmons claims title under these deeds. After the execution and delivery of these deeds by Mary R. Godman, her husband and the six children, one of the children died without issue, and another one, a daughter, married Henry S. Emmerson. Mrs. Emmerson died in February, 1880, leaving the plaintiff as her only child, and Mary R. Godman died in 1888, leaving two sons and two daughters and the plaintiff, her grandson, as her only heirs-at-law.

"The case turns upon the construction of

the deed to Mary R. Godman. If the plaintiff's mother took a vested remainder by that deed, then he cannot recover, for in that event his mother's deed conveyed that interest; but if she took a contingent remainder only then he is entitled to recover.

"* * * * Here the deed by its own terms created a life-estate in Mary R. Godman with remainder 'to the heirs of her body.' Now there is nothing in this deed from which we can say that the word 'heirs' means children, and this being so, we must give to it its ordinary legal signification. As no one can be the heir of a living person, it must follow that there was, at the date of the deed, an uncertainty as to who would take in remainder; for it could not be told who would be the heirs of Mary R. Godman until her death. This uncertainty as to the persons who are to take in remainder is the very thing which creates one class of contingent remainders. This has been pointed out in numerous cases in this court, and it is sufficient to cite Rodney v. Landau, 104 Mo. 251, and the cases there cited.

"The deed here in question would, it is believed, create an estate tail at common law under the influence of the rule in Shelley's case. Section 8338, Revised Statutes, 1899, first enacted in 1835, abolishes the rule in Shelley's case (Riggins v. McClellan, 28 Mo. 23; Tesson v. Newman, 62 Mo. 198; Muldrow v. White, 67 Mo. 470), and at the same time declares what effect shall be given to a deed like the one now in question. * * * * By force of this section, those persons who were the heirs of the body of Mary R. Godman at the termination of the life-estate, that is to say at her death, took the estate in fee simple. As Mrs. Emmerson died during

the life of her mother, the life-tenant, she was not an heir of her mother. The plaintiff, through his deceased mother, Mrs. Emmerson, became and was an heir of Mrs. Godman; for the expression, 'heirs of the body,' means and includes lawful issue, children, and through them grandchildren in a direct line. 1 Washburn on Real Property, 72.

"The statute just quoted converted the estate tail, created by the deed at common law, into a life-estate in the first taker with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of the body of the tenant for life. The plaintiff answers that description, and he is entitled to the one-fifth of the property. * * * *"

The rule is also stated in the case of Lewis v. Lewis, 136 S.W. (2d) 66, 1.c. 71:

"Reviewing the facts before us, we find that item 4 of the will devises the real estate described to respondent 'for the term of her life and, at her death, to the heirs of her body, absolutely in fee simple.' Respondent, therefore, took a life estate in said real estate with a remainder in fee unto those who should prove to be heirs of her body at her death. Sec. 3110, R.S. Mo. 1919, Mo. St. Ann. Sec. 3110, p. 1938. The remainder in fee was contingent or executory since the estate in remainder was limited to take effect upon an uncertain event, to-wit, respondent having heirs of the body, and to uncertain persons, to-wit, those who should be the heirs of her body at her death. * * * *"

Construing Section 3500, Mo. R.S.A., supra, the court said in the case of Kennard v. Wiggins, 160 S.W. (2d) 706, 1.c. 709:

"Under these sections, the vesting of the fee-simple estate devised or conveyed is

postponed until the termination of the
life estate, and made to vest in the per-
sons who are the heirs of such tenant for
life at that time * * *

This principle of law was discussed by the court in the case of Stigers v. City of St. Joseph, 166 S.W. (2d) 523, 1.c. 524, 528, 529, and the court held that a contingent remainderman did not have an interest that would entitle him to bring an action for damage to the property. The court said:

"The petition (filed April 16, 1937) alleged that plaintiff Quantie Stigers was the owner of a life estate in the described real estate with remainder in fee to the heirs of her body; that such interest was acquired under a warranty deed from William Sallee, dated June 12, 1900, and duly filed for record; that the other plaintiffs were the two sons of Quantie Stigers; that they joined in the action for and on behalf of themselves and on behalf of whatever person or persons should afterwards be determined to be the heirs of the body of plaintiff Quantie Stigers; * * * *

* * * * *

" * * * * There is no suggestion in the record that plaintiffs William L. Stigers and Warren C. Stigers had or have any interest in the described real estate, except under the deed of William Sallee. * * * * If William Sallee had title and the said deed was in fact delivered during his lifetime, these plaintiffs are merely contingent remaindermen and the fee simple title will vest in the persons who, on the termination of the life estate, shall be the heir or heirs of the body of the tenant for life Quantie Stigers. * * * * While Quantie Stigers lives, these plaintiffs have no right to the possession or control of the described real estate nor any present estate therein, but only an interest, to wit, a

chance or protective right to an estate in the event they survived their mother as heirs of her body at her death. * * * In such situation these plaintiffs now seek to recover damages for the trespass and injury to such future interest in said real estate, when it is not certain that they will ever have an estate therein or any vested rights to protect; nor that Quantie Stigers will be survived by any heirs of her body. Accordingly, these plaintiffs may not maintain this action for damages. * * * *"

The abstract you submitted has not been extended to date, and this opinion is written upon the assumption that the facts stated in the letter from Merrill and Enger, attorneys for Lena Martin, claimant, are true.

Conclusion.

It is, therefore, the opinion of this department that Lena Martin is one of the bodily heirs of life tenant Albert Grotjan and has a one-seventh interest in the property in question.

Respectfully submitted,

W. BRADY DUNNAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

SCHOOLS:
LINCOLN UNIVERSITY:

RE: Lincoln University is not entitled to share
in the seminary fund created under Section
10876, R. S. Mo. 1939.

August 15, 1946



8-23
President Sherman D. Scruggs
Lincoln University
Jefferson City, Missouri

Dear President Scruggs:

This will acknowledge receipt of your letter of August 6, 1946, requesting an opinion of this department as follows:

"The Curators of Lincoln University would seek the opinion of the Attorney General on the matter of the right of Lincoln University to participate in the Seminary Fund.

"Does Lincoln University by virtue of its statutory position as the Institution for the higher education of the Negro people of the State of Missouri have a right to a proportionate share in the funds allocated to the State University out of the Seminary Fund as it is designated and referred to in Article 27, Section 10876, Revised Statutes, State of Missouri 1939? If Lincoln University is entitled to a share in said fund, to whom and how may its claim be presented?

The Curators would be most pleased to have the opinion of the Attorney General on these questions."

Section 10876, R. S. Mo. 1939 creates the fund established for the support of the University of the State of Missouri, the College of Agriculture and the School of Mines and Metallurgy, which fund is known as the Seminary fund. This section reads as follows:

"Sec. 10876. Seminary fund created

"There is hereby created and especially established a fund for the support of the university of the state of Missouri, the college of agriculture and the school of mines and metallurgy,

to be denominated the seminary fund, which shall consist of: First, the proceeds of sale of seminary lands, as provided by act approved February 11, 1839, which money is invested in a state certificate of indebtedness of \$122,000.00, dated July 1, 1881, issued by authority of act March 23, 1881; interest to be applied as directed by the board of curators. Second, the proceeds from sale of one hundred Missouri bonds issued under act of March 29, 1872, represented by a state certificate of indebtedness of \$100,000.00, dated January 22, 1904, issued under act of March 31, 1883; interest to be applied as directed by the board of curators. Third, the proceeds of the sale of the lands donated to the state of Missouri by the United States for the support of the college of agriculture and the school of mines and metallurgy by act of congress, approved July 2, 1862, represented by state certificates of indebtedness of the following amounts and dates: April 2, 1905, \$5,000; February 25, 1906, \$5,000; January 1, 1908, \$5,000; December 15, 1908, \$5,000; May 15, 1889, \$5,000; July 1, 1891, \$5,000; May 15, 1893, \$5,000; April 2, 1895, \$22,881.19; April 9, 1895, \$5,000; July 2, 1903, \$242,000; November 1, 1903, \$5,000; January 30, 1904, \$5,000; April 19, 1904, \$35,000; representing a total of \$349,881.19 now issued or any certificates which may hereafter be issued under any general or special act of the general assembly. One-fourth of the interest on these funds shall be paid to the treasurer of the school of mines and metalurgy at Rolla, for the maintenance of said institution, and the remainder to be applied for the maintenance of the college of agriculture. Fourth, the funds paid into the state treasury by authority of sections 10881, 10882 and 10884, R. S. 1939, represented by certificates of the following amounts and dates: July 1, 1898, \$6,000; January 2, 1902, \$3,000; November 26, 1902, \$1,000; the interest to be applied to the maintenance of the state university at Columbia. Fifth, the state certificate of indebtedness of \$646,958.23, derived from 'direct tax' received from the

United States, dated April 1, 1891, issued under act of March 26, 1891, four-fifths of the interest to be applied for the maintenance of the state university at Columbia, and one-fifth for the school of mines and metallurgy at Rolla. Sixth, the James S. Rollins scholarship fund of \$6,000, represented by a state certificate of indebtedness, issued under act of March 31, 1883, and interest to be applied to the maintenance of the 'James S. Rollins university scholarship.' Seventh, the proceeds of sales of lands donated to the school of mines and metallurgy at Rolla, represented by a state certificate of indebtedness of \$2,000, dated April 15, 1893, issued under act of March 31, 1883; interest on which shall be applied to the maintenance of the school of mines and metallurgy at Rolla. Eighth, the state certificate of indebtedness of \$3,000, issued under act of April 1, 1895, dated April 1, 1896; four-fifths of the interest to be applied to the maintenance of the state university at Columbia and one-fifth to the school of mines and metallurgy at Rolla."

Section 10877, R. S. Mo. 1939, designates the purposes for which the fund is to be devoted and reads as follows:

"Sec. 10877. To remain a permanent fund

"The seminary fund shall be and remain a permanent fund, to be invested in accordance with the provisions of articles 22, 23, 24, 27 and 28 of this chapter, and each division thereof aforesaid, constituting the same, shall be devoted exclusively to the purposes and objects expressed in the act of congress or of the legislature relating thereto."

It is clear that section 10877, supra, does not create a fund in which Lincoln University is entitled to share. Lincoln University is not a part of the University of the state of Missouri, nor of the college of agriculture, nor of the school of mines and metallurgy. Lincoln University is created and provided for in a separate portion of the Revised Statutes of Missouri, 1939, namely, Article 21 of Chapter 72, from that creating and providing for the state university, the college of agriculture and the school of mines and metallurgy, which latter are provided for in Articles 22 and 23 of Chapter 72 of the Revised Statutes of 1939.

Section 10773, R. S. Mo. 1939, Chapter 72, Article 21, reads as follows:

"Sec. 10773. Lincoln institute changed to Lincoln University

"The name of the Lincoln Institute is hereby changed to the Lincoln University."

Section 10774, R. S. Mo. 1939, reads as follows:

"Sec. 10774. Board of curators authorized to reorganize

"The Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up to the standard furnished at the State University of Missouri. To this end the board of curators shall be authorized to purchase necessary additional land, erect necessary additional buildings, to open and establish any new school, department or course of instruction, to provide necessary additional equipment, and to locate the respective units of the university wherever in the State of Missouri in their opinion the various schools will most effectively promote the purposes of this article."

Section 10778, R. S. Mo. 1939, reads as follows:

"Sec. 10778. Board to organize and have same powers as curators of state university of Missouri

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state university of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state university of Missouri, except as stated in this article."

All of these sections, as well as others in the statutes, show that there is a distinct and different statutory set-up for Lincoln University.

Section 10877, supra, quoted above, refers to articles 22, 23, 24, 27 and 28 of Chapter 72 and states that each division of the seminary fund, as such divisions are set up in section 10876, shall be devoted exclusively to the purposes and objects set out in section 10876, supra. An examination of the latter section shows that all of the divisions except the first and second provide that the money therein shall be used by the state university at Columbia, the college of agriculture and the school of mines and metallurgy at Rolla, Missouri. The first and second divisions are to be applied as directed by the board of curators. This must of necessity apply to the board of curators of the University of the state of Missouri and, as stated above, the State University is provided for in a different article than is Lincoln University.

CONCLUSION

It is, therefore, the opinion of this department that Lincoln University is not entitled to share in the seminary fund created by Section 10876, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

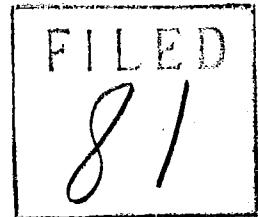
J. E. TAYLOR
Attorney General

SNC:mw

MINES, State Bureau of :
CONSTITUTION LAW; Section 23, Art. IV:
setting up fiscal year does not affect:
date State Chief Mine Inspector must :
file annual report. :

Constitutional provision changing
date of fiscal year does not affect
statutory requirement that Mine
Inspector must make report in January.

February 6, 1946



Honorable E. H. Shelton
Secretary
Missouri Bureau of Mines
Jefferson City, Missouri

Dear Mr. Shelton:

This Department is in receipt of your request
for an official opinion, which reads as follows:

"When shall the BUREAU OF MINES pub-
lish the Annual Report of the Depart-
ment of Mines and Mining for the period
of time from January, 1945?

"Due to the change of the date of the
fiscal year by the new constitution we
are not clear on the above question."

Section 14841, Laws of Missouri, 1943, page 650,
provides for the State Bureau of Mines, with the State
Chief Mine Inspector as its head, and further provides
that: " * * * It shall be the duty of the state chief
mine inspector so appointed, to * * * make report to
the governor, annually, on the first day of January in
accordance with the existing laws of the state in refer-
ence to mining."

Section 23, Article IV of the Constitution of
Missouri, 1945, provides in part, as follows:

"The fiscal year of the state and all
its agencies shall be the twelve months
beginning on the first day of July in
each year. * * * "

Section 14841 is plain in its requirement that
the State Chief Mine Inspector shall render his report

on the first day of January. The constitutional provision sets forth when the fiscal year for the State shall begin. It is well-settled that the term "fiscal year" applies only to the financial operations of the State. As was said in Union Trust & Savings Bank vs. City of Sedalia, 300 Mo. 399, 254 S.W. 28, 1.c. 411:

"The qualifying word 'fiscal' is the thing upon which appellant hangs its hopes. Law writers and lexicographers, have thus defined the word:

"In Black's Law Dictionary, fiscal is defined as 'relating to the fisc or public treasury; relating to accounts or to the management of revenue.'

"In Rapalje & Lawrence's Law Dictionary it is defined as 'belonging to the exchequer, revenue or public treasury.'

"Bouvier's Law Dictionary defines it as 'belonging to the fisc or public treasury.'

"The term fiscal year is defined by the leading lexicographers as follows:

"Funk & Wagnall's New Standard Dictionary defines the term fiscal year as 'the financial year at the end of which the accounts are balanced.'

"Webster's International Dictionary defines fiscal year as 'the year by or for which accounts are reckoned, or the year between one annual time of settlement or balancing of accounts, and another.'"

Further, it is pointed out in Shaffner vs. Lipinsky, 194 N.C. 1, 138 S.E. 418, 419:

"In administration of state or government or corporation, fiscal year is period of 12 months, not necessarily concurrent with calendar year with reference to which its appropriations are made and expenditures

February 6, 1945

authorized, and at end of which its accounts are made up and books balanced."

Therefore, the Constitution when it provides that the fiscal year shall be from July 1 to June 30, meant that this period of time should apply only to appropriations, and other matters relating to the public treasury. It was not, in any way, intended that such provisions should apply to the time when reports were to be made by public officials. The first day of January is merely an arbitrary date as is shown by a reading of other statutes of this State as to when reports must be made by the various State Departments to the Governor.

Section 7884, R.S. Mo. 1939, provides that the Commissioner of Finance shall make a report to the Governor, setting out the condition and work of the department, on or before the first day of December of each year.

Section 8977, R.S. Mo. 1939, states that the Commission of the Department of Penal Institutions shall make a report on or before the second Monday in January of each year.

The State Board of Nurse Examiners, under Section 10028, R.S. Mo. 1939, must make a report on or before the thirty-first of December, while the Commissioner of Labor and Industrial Inspection, under Section 10154, R. S. Mo. 1939, is required to make a report to the Governor on or before the fifth of November of each year.

CONCLUSION.

It is, therefore, the opinion of this Department that under Section 14841, Laws of Missouri, 1943, page 650, the State Chief Mine Inspector is required to make an annual report to the Governor on the first day of January, and such requirement has not been affected by Section 23, Article IV of the Constitution of Missouri, 1945, which changes the fiscal year of the State and all its agencies.

Respectfully submitted,

APPROVED:

ARTHUR M. O'KEEFE
Assistant Attorney General

J. E. TAYLOR
Attorney General

AMO'K:ir

SMALL LOANS: Finance Commissioner has no authority
to issue small loan licenses after
CONSTITUTIONAL LAW: July 1, 1946.

July 1, 1946



Honorable Harry G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Shaffner:

This will confirm my oral opinion given you today,
holding that you do not have authority to issue small
loan licenses and that you should not do so for the
reasons hereinafter set forth.

Section 44 of Article III of the Constitution of 1945
provides as follows:

"Sec. 44. Uniform Interest Rates.-- No law
shall be valid fixing rates of interest or
return for the loan or use of money, or
the service or other charges made or imposed
in connection therewith, for any particular
group or class engaged in lending money.
The rates of interest fixed by law shall
be applicable generally and to all lenders
without regard to the type or classification
of their business."

The above Section plainly prohibits the fixing of rates
of interest for any particular group or class engaged
in lending money, and further provides that rates of
interest fixed by law, shall be applicable generally
to all lenders without regard to the type or classi-
fication of their business.

Hon. Harry G. Shaffner

-2-

July 1, 1946

The small loan law does fix rates of interest for a particular class of lenders, and the rates of interest provided in said small loan act do not apply generally to all lenders. The small loan law is, therefore, in conflict with Section 44 of Article III of the Constitution, supra.

Under the provisions of Section 2 of the Schedule of the new Constitution, all laws inconsistent with the new Constitution automatically become void on and after July 1, 1946. Therefore, there is no law at the present time authorizing you to issue small loan licenses, nor is there any law authorizing persons, co-partnerships, or corporations to operate thereunder.

It is, therefore, the opinion of this office that you do not have authority to issue licenses to applicants for small loan licenses on and after this date and that you should not attempt to do so.

Yours very truly,

J. E. TAYLOR
Attorney General

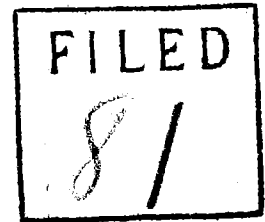
JET:kb

LOAN & INVESTMENT COMPANIES--

Claim for refund on unused license fees:

: Loan and investment companies may
: present a claim against the State
: to the Legislature for an appro-
: priation as a refund for unused
: part of annual license fee, where
: the license has become inoperative
: by law. But they may not sue the
: State.

July 25, 1946



Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your request for an opinion from this Department upon the subject expressed in your letter, which is as follows:

"We are in receipt of the following letter from the Citizens Loan & Investment Company, Joplin, Missouri:

"In January of this year we paid a license of \$150 to operate under the loan and investment act for one year. Inasmuch as this law went out July 1, we are of the opinion that we are entitled to a refund of \$75."

"Kindly favor this Department with an opinion in this connection."

We find in our research on the question you submit, the following authorities on the right of a licensee to recover the unused part of a license fee previously paid, where the benefits anticipated from the unused part thereof are denied him through no fault of his:

37 C.J. 255, contains the following text on the subject, to-wit:

"The unearned portion of the money paid for a license may be recovered

by the licensee, where the license has become inoperative by acts or circumstances over which he has no control and without his volition, as where he is deprived of his license by a statute or ordinance which prohibits the occupation for which the license was obtained,
* * * "

The above text at foot-note 88, cites 48 Mo. App. 26. That case, Sharp vs. The City of Carthage, was a case where an applicant for a saloon license paid into the city treasury the fee required by the city for keeping a dram shop for one year. The next day, it appears, the City of Carthage voted affirmatively establishing the local option law. Later, the applicant applied to the County Court of Jasper County for a county license to keep a dram shop. The county license was refused him because the City of Carthage had previously established local option.

The law in force at the time the application was made for the licenses, prohibited a dram shop keeper from selling liquor without taking out a county license, under the penalty of a heavy fine. The applicant sued to recover the balance of the unused license fee. The St. Louis Court of Appeals holding that the applicant was entitled to recover at l.c. 30, 31, said:

"* * * The controlling question here is, can money be recovered back when the object for which it is paid is frustrated, not by accident nor by the act of the party paying it, but by the act of the party to whom it is paid? The license issued by the city of Carthage to the plaintiff created a contract between that city and the plaintiff, which even the local-option law recognized as a property right by providing that its adoption after the grant of the license should not interfere with rights acquired under it. That such a contract cannot be annulled by the

city without cause has been frequently decided. State ex rel. Shaw v. Baker, 32 Mo. App. 98, 101, and cases cited. The plaintiff did not pay \$800 for a piece of worthless paper, but for the privilege of carrying on a dramshop within the city for a period of one year without interference by the city while he complied with other legal requirements. When the city immediately thereafter voted against the sale of intoxicating liquors within its boundaries, it thereby effectually prohibited the county court from granting a license to plaintiff, and rendered its own license worthless. The case is not distinguishable on principle from one, where the city, having power to revoke a license, would on one day issue license for a year, pocket the proceeds, and then revoke it the next day without cause, because the case concedes that the only reason, why the county court failed to issue a license to the plaintiff, was that the city by its vote had prohibited it from so doing. The principle governing an action for money had and received is that the possession of money has been obtained which cannot be conscientiously withheld. * * * "

The case of Douglas, Appellant, vs. Kansas City, Appellant, 147 Mo. 428, was also a case involving the issuance of a dram shop license. Three parties had been carrying on such a saloon business outside of the City of Kansas City, but the City undertook to extend its boundaries to include the territory where such parties were carrying on such business. The City demanded the payment of a dram shop license tax from the saloon keepers. The attempted extension of the City limits to include the place where these parties were carrying on their liquor business was later declared invalid. In the meantime, however, the parties were arrested for non-payment of the tax, and only secured their release from custody upon its payment. The parties assigned to plaintiff in the case

their claims against the City for the money so obtained from them. Suit was filed against the City, and the plaintiff obtained a judgment for something less than the full amount he sued for, because he had failed to supply evidence of certain items included in his petition. Our Supreme Court in the above styled case, in affirming the judgment for plaintiff for so much of his claim as he did recover, l.c. 439, said:

"If the officers and agents of a city exact in its behalf an unauthorized and illegal license tax, under threat of immediate arrest in case of refusal, and they are clothed with power to carry their threat into execution at once, a payment made to avoid such consequences is not voluntary and the money may be recovered back. * * *".

The principle underlying the cases above cited, and from which excerpts are quoted, is that of the right to sue for money had and received.

The case of Propst et al. vs. Sheppard et al., 174 S.W. (2d) 359, was a case before the St. Louis Court of Appeals, in a suit to recover money had and received. In affirming a judgment for recovery in that case the St. Louis Court of Appeals, l.c. 363, in quoting a late text work said:

"In 4 Am. Jr., Assumpsit, Sec. 20, page 509, it is said that the action for money had and received is 'less restricted and fettered by technical rules and formalities than any other form of action.* * * The action for money had and received is founded upon the principle that no one ought unjustly to enrich himself at the expense of another * * * .' * * *".

Section 5425a, Laws of Missouri, 1943, page 505, is in part, as follows:

"The Commissioner of Finance shall have and exercise the same supervision, authority and power over, and shall be charged with the same duties toward all corporations organized under the provisions of

Article 8, Chapter 33, Revised Statutes of Missouri, 1939, as he now has and exercises and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, Revised Statutes of Missouri, 1939, as far as the same may be applicable,
* * * "

On page 506, Laws of Missouri, 1943, said Section 5425a is continued, and provides that loan and investment companies on or before December 20 of each year shall pay an annual license fee of \$150 for the next succeeding calendar year. It provides that failure to pay such annual fee at the time specified shall work a forfeiture of such license as of the 31st day of December following.

Neither Article 8 of Chapter 33, R.S. Mo. 1939, our article dealing with loan and investment companies, nor the amendment in the Act of 1943, Laws of Missouri, 1943, page 502, etc., provide any general penal section for violation of the terms of said article or the amendment thereto. However, Section 5422 of the amending Act of 1943, Laws of Missouri, 1943, l.c. 504, does provide that loan and investment companies violating the terms of said Section 5421, Laws of Missouri, 1943, pages 503, 504, shall be deemed guilty of a misdemeanor. This does not reach violations of any other section of said Article 8, or said amendment of 1943 thereto. However, under the rule announced by our courts all corporations obtaining franchises or licenses from the State, contract thereby with the State to obey all laws of the State. And while, as stated, there is no provision for penalty except in the said Section 5422, for the violation of the provisions of said Section 5421, Laws of Missouri, 1943, any loan and investment company would, we believe, for violation of any of the provisions of said Article 8, Chapter 33, or the amendment thereto, in said Act of 1943, be subject to ouster by quo warranto. We believe then that the same rule of law would apply to loan and investment companies who may have paid their annual license fee in advance as

was applied by our Appellate Courts in the Carthage case, supra, and in the Kansas City case, supra. That is to say, where the license was paid under conditions involving penalties and forfeiture, the right to recover in assumpsit for money had and received would inure to the licensee where a failure of consideration interposes on the ground that through no fault of the licensee the benefits of a part of the period for which the license was granted was denied him.

Said Section 5425a, lc. 506, specifically provides that the license to conduct a loan and investment business shall remain in force "until it is surrendered by the licensee or forfeited or revoked by the Commissioner of Finance".

We believe under the language of the statutes quoted, and the rulings by our Appellate Courts in the decisions cited and quoted above, that the licensee in the case mentioned is entitled to recover from the State the unused part of its license fee. We can see no difference in a case where a county receives a dram shop license fee and a case where the State receives a loan and investment license fee in the application of the principle that the unused part of the annual license fee may be recovered on the basis of money had and received for the reason that in either case the county or the State never became the real owner thereto, because of a part failure of consideration.

There is also accompanying your letter requesting this opinion, your reply by letter, to the communication from the Citizens Loan & Investment Company of Joplin, Missouri. Your said reply is as follows:

"We are in receipt of your letter dated July 8 in which you express the opinion that you are entitled to a refund of \$75.00 on your license fee of \$150 to operate under the Loan and Investment Act for one year.

"There have been no provisions made for this Department to make a refund. Therefore, this matter has been referred to the office of the Attorney General of the State of Missouri."

A part of said Section 5425a, Laws of Missouri, 1943, page 505, l.c. 506, is as follows:

"All fees collected under this section shall be paid directly into the state treasury by the Commissioner of Finance and credited to the state banking department fund."

We do not believe your Department has any duty to perform in this kind of case.

The fees collected from loan and investment companies having been paid into the State Treasury it may only be withdrawn under the terms of Section 28, Article IV of the new Constitution of this State, which is as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 15, Article IV of the present Constitution of this State outlining the duties of the State Auditor is in part, as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected

and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law.
* * * "

It would thus appear to be a private matter on the part of the loan and investment company to obtain from the State a refund of the unused part of the license fee mentioned.

It is an axiom of the law that the State cannot be sued without its consent. 59 C.J. 300 states the rule as follows:

"A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, * * * "

In the case of State ex rel. State Highway Commission vs. Bates, 317 Mo. Rep. 696, l.c. 700, our Supreme Court said:

"* * * 'It is fundamental that the State, being sovereign, cannot be sued without its consent.' * * * "

Under these authorities and many others which might be cited the said company may not sue the State without its consent, and such consent nowhere appears in our statutes or Constitution. The company then is left to the proceeding of presenting its claim to the Legislature for an appropriation to refund said unused fee. The said company may have a just claim against the State, but it cannot sue the State for it. When and if the Legislature should make an appropriation in behalf of the company for

such purpose, we believe the company would then present the claim to the comptroller under the last clause in Section 22, Article IV of the new Constitution, which is as follows:

"* * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

The State Auditor then would no doubt issue his requisition upon the State Treasurer who would issue his warrant in discharge of the claim.

CONCLUSION.

1) It is, therefore, the opinion of this Department under the above cited authorities that the named loan and investment company has a lawful claim for reimbursement for the unused part of its license fee paid to the State for the year 1946.

2) That your Department has no duty to perform in the matter.

3) That the loan and investment company may not sue the State for the claim but its reimbursement lies with the Legislature under the Constitution of this State, and such legislation as may be in force in relation thereto.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

CONSTITUTIONAL LAW: County courts, under the 1945 Constitution, retain jurisdiction to entertain petitions for the incorporation of cities and towns.

September 12, 1946

FILED

81

9/20
Honorable Robert M. Sevier
Judge of the Probate Court
Liberty, Missouri

Dear Judge Sevier:

This is in reply to yours of recent date wherein you request an official opinion from this department, which reads as follows:

"I am making this request directly since time does not permit me asking the Prosecuting Attorney to write for an opinion on the following question.

"Section 6217 Revised Statutes, Missouri, 1939, is the only section in the Missouri Statutes by which any place that desires to be incorporated as a city can take the steps therein indicated to do so. Now then, in view of the new Constitution in which the County Courts are no longer courts of record and in view of the function of the County Courts in such Section 6217, would you tell me if any pending legislation has been proposed placing the functions of the County Courts in any other court of record?

"As there is no County Court of record at this time, would there be any question as to the validity of the incorporation simply by reason of the fact that this section, if no new section has been proposed, is still in effect, especially in view of the new Constitution?"

The provisions of Section 6217, R.S. No. 1939, applicable to your question are as follows:

"Any city or town of the state not incorporated may become a city of the class to

which its population would entitle it under this article, and be incorporated under the law for the government of cities of that class, in the following manner: Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, setting forth the metes and bounds of their city or town and commons and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such city or town, and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated, designating in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic and incorporate, by the name and style of 'the city of', or 'the town of', and the first officers of such city or town shall be designated by the order of the court, who shall hold their offices until the first general election of officers, as provided by law, and until their successors shall be duly elected and qualified: Provided, that any city or town of the state of Missouri, not incorporated, having sufficient population to entitle it to become a city of the third class, in making application for incorporation as a city of the third class, may include in its petition for such incorporation a request that it be authorized to avail itself of the provisions of article 6 of chapter 38, and the county court, in passing upon such application, shall have power in its order of incorporation to authorize said city to be governed by the provisions of said article as fully as if the provisions of said article had been adopted by a formal election of the

inhabitants of the territory comprised therein; and thereupon such county court shall appoint the officers of such city provided by said article: Provided, that when any city or town is or may be situated on the county line, and in two counties, the petition shall be signed by a majority of the taxable inhabitants of such city or town in each county, and presented to the county court of each county, and designating which of the two county courts shall designate the officers therefor, and if the county court of each county declares such city or town incorporated, the inhabitants thereof shall thenceforth be a body politic and incorporate, by the name and style of 'the city of,' or 'the town of,' and provided further, that appeals taken from the decision of the mayor, judge or other officer before whom any cause is tried, acting for said city or town, may be sent to the circuit court of either county wherein such city or town is situated, as may be specified in the order granting such appeal."

Due to the fact that Section 7, Article VI, of the Constitution of 1945 does not contain the phrase, "which shall be courts of record," that was in Section 36, Article VI, of the 1875 Constitution, which provided for county courts to be courts of record, your request raises the question of the authority of the county court under the 1945 Constitution to entertain a petition for the incorporation of cities and towns. Section 7, Article VI, of the Constitution of 1945 reads as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Section 36, Article VI, of the 1875 Constitution, which was the source of said Section 7, Article VI, of the 1945 Constitution, reads as follows:

"In each county there shall be a county court, which shall be a court of record, . and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

While the aforesaid phrase, "which shall be courts of record," was not included in Section 7, Article VI, of the Constitution of 1945, still said Section 7 contains the phrase "and keep an accurate record of its proceedings."

The 63rd General Assembly, by Senate Bill No. 229, amended Section 1990, R.S. No. 1939, which originally contained "county courts" as courts of record. By this amendment "county courts" were not included as courts of record. Even though the lawmakers by this bill defined courts of record, nevertheless the county court under its constitutional duties must "keep an accurate record of its proceedings." If the county court keeps an accurate record of its proceedings in performing its statutory duties under said Section 6217, R.S. No. 1939, relating to the incorporation of cities and towns, this record would be sufficient to authorize the court to entertain the proceedings.

Since the last paragraph of your request is somewhat general on the question of the jurisdiction of county courts over such matters, we will consider the question of the jurisdiction of the county court to entertain such a proceeding.

If the proceedings for the incorporation of cities and towns were purely judicial, then the county court would not have jurisdiction, because under the 1945 Constitution it no longer has purely judicial power. Section 1, Article V, of the 1945 Constitution reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

It will be noted that this section does not include county courts as courts of this state having judicial power. Section

1, Article VI, of the 1875 Constitution, which was the source of this section, did include county courts as courts which were vested with judicial power.

However, if the proceedings for the incorporation of cities and towns are quasi judicial or of an administrative or legislative nature, the county court may still entertain them. Said Section 1, Article V, of the 1945 Constitution, when considered alone, would not authorize a county court to exercise judicial functions. However, by referring to Section 22 of said Article V, one would conclude that some judicial or quasi judicial powers may still be exercised by an administrative officer or body existing under the Constitution or law. This section reads as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

It would, therefore, seem that, under this section, the county court may perform some judicial or quasi judicial functions, and that its orders in relation thereto would be subject to judicial review.

Again referring to said Section 6217, R.S. 1939, we find that the Missouri Supreme Court, in the case of *In re City of Uniondale--Coyne et al. v. Hugh et al.*, 225 S.W. 985, had before it for construction the provisions of said section. At l.c. 987 the court said:

"The procedure prescribed is brief and simple:

"Whenever a majority of the inhabitants * * * shall present a petition to the county court, * * * praying that they may be incorporated, * * * if the court shall be satisfied that a majority of the taxable inhabitants * * * have signed such petition, the

court shall declare such city or town incorporated. * * *

"No notice of any kind is required. It is not necessary that the petition shall have been on file for any length of time, or even that it shall have been filed at all, before being taken up for consideration by the court. Upon its presentation the court may immediately proceed to determine whether it is signed by a majority of the taxable inhabitants, and, if it is satisfied that such is the case, may make its order of incorporation without further ado. Not only, therefore, is notice not required, but the statute does not contain the slightest implication that the taxable inhabitants of the territory sought to be incorporated, who do not sign the petition, may appear and contest it. It must be borne in mind that this proceeding is not an 'action,' within the meaning of the Code, wherein any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff. It is a special statutory proceeding. * * *"

From this statement it would appear that the provisions of the statute which provide for the incorporation of municipalities under said Section 6217, supra, are primarily legislative, and that while the functions of the county court in determining whether the petition for incorporation has been signed by a majority of the taxable inhabitants is a judicial function, it is only incidental to the primary function which is legislative, and, therefore, could more appropriately be termed as "quasi judicial." The question here is analogous to the proceedings in the formation of a drainage district under circuit court procedure. The drainage laws make provision for such procedure to be in the circuit court. Since the circuit court under the Constitution exists and functions under the judicial department of government, the question of the authority to confer upon the circuit court the duties of incorporating such districts was raised in the case of Birmingham Drainage District v. C.A. & Q. R.R. et al., 274 Mo. 141. In speaking of the authority to impose upon the circuit court as a legislative agent the duties of entertaining proceedings for incorporation of drainage districts, the court said, l.c. 150:

"Although article three of the State Constitution, while distributing the powers of the State Government into three distinct departments--the legislative, executive and judicial--forbids any person or collection of persons charged with the exercise of powers properly belonging to one of those departments to exercise any power properly belonging to either of the others, we have held (State ex rel. v. Higgins, 125 Mo. 364, 368) that duties which are not judicial may be performed by judicial officers unless they are clearly such as are confined by the Constitution itself to the executive or legislative department. This literal and altogether reasonable construction is founded in the necessities inherent in all governments. While the power to indicate what the laws shall be is purely legislative, the power to authoritatively determine what they are is judicial, and these are frequently so interlocked as to suggest the assistance of the judiciary in giving practical effect to a legislative enactment. The case before us is an excellent illustration of this principle, because it includes in the accomplishment of the single result contemplated by the Legislature the performance of both legislative and judicial functions distinctly separated by the Constitution, and each definitely assigned to its own magistracy. To accomplish the single purpose of putting in action a drainage district required not only the enactment of a statute fixing the extent, purpose and general powers of the district, which is a purely legislative function, but the appropriation of private property for such purpose and determining the damage therefor by jury trial, which are distinctly judicial functions. Between these lies 'no man's land,' a region of action unclassified by the terms of the Constitution."

From this opinion, it will be noted that the court has recognized the rule that legislative functions are sometimes imposed by statute upon the judicial department and, under certain circumstances, are not violative of the provisions of the Constitution which distribute the powers of state government. These provisions are now contained in Section 1, Article II, of the 1945 Constitution.

If Section 6217, R.S. Mo. 1939, confers on the county court "purely judicial powers," then by virtue of Section 2 of the Schedule of the Constitution of 1945, it would be void because it is in conflict with said Section 1, Article V, of said Constitution, which has taken away from the county court the judicial powers which it had under the 1875 Constitution. From a reading of the transcript of the debates of the 1945 Constitutional Convention relating to this subject, it seems that the framers of that article construed this section to mean that the county court would no longer exercise powers which are "purely judicial." Referring to the debates, however, we recognize the principle that reliance on such debates must be limited. *State ex rel. v. Osborne*, 147 S.W. (2d) 1065.

The rule that, "where a statute or ordinance is susceptible of two constructions, one of which makes it valid and the other invalid, the construction which sustains the validity will be applied," should be applicable here. The foregoing rule has been applied on numerous occasions, and we find in the case of *Automobile Gasoline Co. v. City of St. Louis et al.*, 32 S.W. 281, 283, where the application was made. Applying this rule to this statute and giving it the construction that the duties of the county court prescribed thereunder are primarily legislative, and that the judicial functions are incidental to the legislative functions and are, therefore, more in the nature of being quasi judicial functions, then the statute can be upheld and not violative of Section 1 of Article V of the 1945 Constitution.

CONCLUSION

From the foregoing, it is the opinion of this department that the duties imposed on the county court by Section 6217, R.S. Mo. 1939, relating to the incorporation of towns and villages, are primarily legislative; that the duty of the

county court of finding that "a majority of the taxable inhabitants of such town have signed such petition" is a judicial function, but that this function is only incidental to the legislative function imposed by said act; that it is not such a judicial function as is included in Section 1 of Article V of the 1945 Constitution, but is more in the nature of a quasi judicial function, which is contemplated by the provisions of Section 22 of Article V of the 1945 Constitution, which functions may be performed by a county court even though it is not named by the Constitution as one of the courts having judicial power.

Therefore, the county court now has authority to perform the duties relating to incorporation of towns and villages which are imposed by Section 6217, R.S. No. 1939.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:LR

**BANKS--LIQUIDATIO.,
FIXING FEES AND
COMPENSATION OF
EMPLOYEES:**

It is the duty of the Commissioner of Finance to fix the fees and compensation of employees, in the first instance, in a bank liquidation. If this has not been done, the Circuit Court or the judge thereof in vacation, may fix such charges.

September 20, 1946

FILED

81

9/27

Mr. H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your request for an opinion on the subject contained in your letter which is as follows:

"Honorable J. E. Taylor
Attorney General
Supreme Court Building
Jefferson City, Missouri

"Dear General Taylor:

"Prior to the time that the final liquidation of a bank is completed by the Special Deputy Commissioner, appointed by this Department, the writer is sometimes requested to approve the fees of the Special Deputy Commissioner and the attorney. In many cases these fees appear excessive. Since it is my desire to approve only such fees which, in my judgment, are fair, is it proper that I take such a stand?

Yours very truly,

H. G. Shaffner
Commissioner of Finance"

The request in your letter demands the consideration of the terms in Sections 7917 and 7918, R.S. Mo. 1939. Those sections were before our Springfield Court of Appeals in the case of Baynes v. Bank of Caruthersville, et. al., 118 S.W. 2, page 1051 on the question of the fixing and allowance of attorney's fees for counsel representing the Commissioner of Finance in the liquidation of a bank. Said sections were considered by the

Sept. 20, 1946

St. Louis Court of Appeals in the case of Davis v. Knox County Savings Bank, 118 S.W. 2, 52, on the question of fixing the amount of compensation to be allowed a deputy commissioner in the liquidation of a bank.

The respective Courts of Appeals in each case, construed said sections on both of said questions, and the respective decisions rendered have made it clear and understandable what the intention of the Legislature was in enacting both of said sections. When the decisions hereinafter quoted were rendered, our present Sections 7917 and 7918 R.S. Mo. 1939, were Sections 5323 and 5324 R.S. Mo. 1929. In answer to the question of the fixing and allowance of attorney's fees we quote from the decision of the Springfield Court of Appeals in the Bank of Caruthersville case, 118 S.W. 2, 1.c. 1052 and 1053 as follows:

"That part of Sections 5323 and 5324, R.S. Mo. 1929 (Mo. St. Ann. Sec's. 5323, 5324 pp. 7552, 7553) applicable to the question is as follows:

'He (the Commissioner of Finance) may employ such expert assistants and counsel * * * as he may deem necessary in the liquidation. * * * Provided however, that no salaries or attorneys fees shall be paid unless approved by the circuit court, or judge thereof in vacation, which circuit court, or judge thereof in vacation, may refuse to approve any salaries or attorney's fees that he may deem exorbitant, and set a less fee or salary, which fee or salary shall be the amount paid.'

'The commissioner shall pay out of the funds in his hands * * * all expenses of liquidation, subject to the approval of the circuit court, or judge thereof in vacation. * * * He shall, in like manner, fix and pay the compensation of special deputy commissioners, assistants, counsel and other employees appointed to assist him in such liquidation pursuant to the provisions of this article.'

"(1) Admittedly, under this statute, the Circuit Court does not have jurisdiction to fix the fees of a deputy or lawyer in the first instance but it is the duty of the Commissioner of Finance to act on such matters

Sept. 20, 1946

first, then the application or proposed payment must be submitted to the Circuit Court for its approval. *Farmers' & Merchants' Bank v. Coleman*, Mo. App., 9 S.W. 2d 549."

* * * * *

"Arkansas has similar statutory provisions (Pope's Digest of St. of Ark. 1937, Vol. I, Sec. 768) and that statute has been interpreted to mean that the Commissioner's employment of counsel is not binding without the court's approval and the trial court may reject a contract providing for a stipulated fee. *Taylor, Bank Com'r v. Moose*, 185 Ark. 856, 49 S.W. 2d 1043; *Wasson, Bank Com'r v. Hunter et al.*, 187 Ark. 1071, 63 S.W. 2d 836. So, also, in the event that a Commissioner arbitrarily refuses to fix the compensation of his employees the court having jurisdiction of the liquidation may fix and approve the fees to be paid for services rendered. *Oakley v. Davis et al.*, 142 Wash. 432, 253 P. 648."

In deciding the Knox County Savings Bank Case our St. Louis Court of Appeals, 118 S.W. 2, 52, in holding that the fixing of the compensation of a Deputy Commissioner for his services for liquidating a bank was, under the statutes, the original duty of Commissioner of Finance, l.c. 58, said:

"It has been held in *Farmers' & Merchants' Bank v. Coleman*, Mo. App., 9 S.W. 2d 549, that the circuit court has not the right to determine in the first instance the amount which deputy commissioners and assistants may receive for their services, but the Commissioner has the original right to set the compensation and it is then within the power of the circuit court to determine whether it is excessive or otherwise. In other words, the circuit court has not the original right to fix the compensation, but it will be noted that the circuit court undertook to do so in the instant case."

Following the authority of said Sections 9717 and 9718 and of the two cases cited, we believe it is clear that it is the duty

Sept. 20, 1946

of the Commissioner to fix the attorney's fees of counsel representing the Finance Department in the liquidation of a bank, in the first instance. The Circuit Court may only fix such fees and compensation, under the above cited cases, where the Commissioner and counsel, or the Commissioner and the Deputy Commissioner, as the case may be, do not agree upon such fees and compensation or where, from any cause, there have been no fees or compensation fixed by the Commissioner.

It is also quite clear that such fees and compensation shall not be paid by the Commissioner until the same have been approved by the Circuit Court, or the Judge thereof, having jurisdiction of the liquidation of a bank, in vacation.

CONCLUSION

It is, therefore, the opinion of this department that the Commissioner of Finance may fix and agree upon the fees and compensation to be paid to persons aiding him in the liquidation of a bank, under the terms of said Sections 7917 and 7918, R. S. Mo. 1939, and under the decisions of our Courts of Appeals, above cited and quoted. When such fees and compensation are fixed and agreed upon they must be submitted to the Circuit Court, or the Judge thereof in vacation, having jurisdiction of the liquidation of the bank for approval or disapproval.

It is further the opinion of this department that in the event there is no agreement made between the interested parties fixing the amount of such fees and compensation, or either of them, or if the Commissioner should refuse to fix such fees and compensation for his employees, then the party should present his claims before the Circuit Court, or the Judge thereof in vacation, and support the same with proof of the services performed and proof of what should be reasonable compensation therefor.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

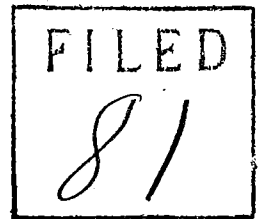
J. E. TAYLOR
ATTORNEY GENERAL

GWC:ma

Banks--Capital Stock: Banks moving into a city of 50,000 or more population must operate under a minimum capital of at least \$280,000.

Should city boundaries of a city of 50,000 inhabitants or more be extended to include banks operating under a \$25,000 capital, such banks are not required to increase their capital.

October 7, 1946



Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter requesting an opinion from this Department, respecting the capital required of banks changing their locations, or the capital structure required where cities extend their corporate limits to take in territory where a bank is already located.

Your letter is as follows:

"Parties interested in the Peoples Bank of Suburban Kansas City, located at Dodson, indicate they will apply to this Department for our permission to move the bank to Waldo, situated within the city limits of Kansas City. Present capital structure of the bank in question, providing \$25,000 common stock and \$25,000 surplus, meets the requirement of the first portion of Sec. 7944, R.S. Mo. 1939. Later the same section recites:

" Provided, however, that any bank now existing, the capital of which is not equal to that limitation required of a bank in its location, may continue to do business under its present capital: Provided, until its capital and surplus fund shall equal forty (40) per centum more than the minimum of capital required for a bank in its location, one-tenth (1/10) of its net earnings for each dividend period as provided in section 7971 shall be credited to the surplus fund, and no such bank shall declare credit or pay any dividends for any dividend period to its stockholders until

it shall have made such credit for that period to its surplus fund.'

"In this instance the cash capital would be \$280,000.

"May we be favored with your opinion with reference to this matter, also, the required cash capital for subject bank when Dodson is taken within the city limits of Kansas City on January 1, 1947?"

In the case cited of the Peoples Bank of Suburban Kansas City located at Dodson, a municipal corporation outside of the corporate limits of Kansas City, Missouri, we believe you have correctly estimated and calculated the cash capital necessary for said named bank to maintain should that bank be moved to Waldo, which is within the corporate limits of Kansas City, Missouri, at \$280,000. Section 7944, R.S. Mo. 1939 governs the matter of capital structure of a bank in cities like Kansas City, Missouri, having a population of more than 50,000 inhabitants. That Section is as follows:

"The amount of cash capital of such bank shall amount to not less than: (a) \$15,000 if the place where its business is to be transacted is an unincorporated or incorporated village or town the population of which does not exceed 1,000 inhabitants; (b) \$25,000 if the place where its business is to be transacted is an unincorporated or incorporated village or town the population of which exceeds 1,000 but does not exceed 5,000 inhabitants; (c) \$50,000 if the place where its business is to be transacted is an unincorporated or incorporated town the population of which exceeds 5,000 but does not exceed 10,000 inhabitants; (d) \$100,000 if the place where its business is to be transacted is a city or town the population of which exceeds 10,000 inhabitants but does not exceed 50,000 inhabitants; (e) \$200,000 if the place where its business is to be transacted is a city the population of which exceeds 50,000 inhabitants: Provided, however, that any bank now existing, the capital of which is not equal to that limitation required of a bank in its location, may continue to do business under its present capital: Provided, until its capital and surplus fund shall equal forty (40) per centum more than the minimum of capital required for a bank in its location, one-tenth (1/10) of its net earnings for each dividend period as provided in section 7971 shall be

credited to the surplus fund, and no such bank shall declare credit or pay any dividends for any dividend period to its stockholders until it shall have made such credit for that period to its surplus fund."

Noting the cash capital required of a bank in cities of over 50,000 inhabitants, and taking cognizance of the fact that Kansas City, Missouri, is such a city, we see from reading said Section 7944, that a bank within the corporate limits of said city must have a cash capital of \$200,000, and in addition to the capital, under the proviso of section 7944 there must be added 40% more than the minimum capital required in its location as its full capital structure. Therefore, if the Peoples Bank of Dodson is permitted to move to Waldo, within the territorial limits of Kansas City, Missouri, it would require a cash capital of \$280,000.

If said named bank undertakes to do so, and is permitted by your department to change its location from Dodson, Missouri, to a suburb within the City of Kansas City, Missouri, it would become practically, within the terms of said Section 7944, if not actually, a new corporation. In other words, it would be invading a new territory different from that where a minimum of \$25,000 capital is required of a bank, and would leave behind the conditions governing its capital structure in the old location. It would become subject to the statutory requirements regulating and governing banks in its new domicile, because the location as to population controls the matter of capital either way. It is quite plain, we think that if a bank, having a capital structure as required under said Section 7944 in a small city, town or village, exceeding 1,000 inhabitants but under 5,000 inhabitants, and having a minimum of \$25,000 capital, it would be required to comply with said Section 7944, as to the minimum cash capital required of banks within cities of more than 50,000 inhabitants, such as Kansas City, should said bank be permitted to move from the lesser inhabited community to one inhabited by more than 50,000 persons.

We think the proviso of said Section 7944 makes it plain and understandable that any bank in a community with a population such as is indicated by the capital structure of the named bank "now existing", as stated in said proviso, means at the time such bank might undertake to move its place of business to a city of larger population, requiring a greater capital structure, and if such banking institution desires to, and actually does, move to a larger city, which, under said Section 7944, requires a greater capital, it would be required to conform to the capital structure required in the city to which it is moving. The statute seems to make it a matter of both population and location, with respect to a bank moving from a small community to a larger one. We believe that, under the facts stated and applying said Section 7944, thereto, the named bank in making the change from

its present location on its own initiative, basing the matter of its minimum capital structure on the question of population, could not invade the territory of banks in the more populous community and become a competitor with them without increasing its capital structure, as is provided by said Section 7944, to that required of banks already located there.

On the other hand, if the City of Kansas City enlarges its territory by extending its corporate limits so as to take in Dodson, the said named bank, if still transacting a banking business at its present location, and under its present capital structure, based upon the population of Dodson, would not have changed its location, nor would it in any way be affected as to its right to do business, or as to the amount of its capital structure, merely because the City of Kansas City had extended its corporate limits to include its location. It would be a matter of the City of Kansas City moving out to the location of the bank instead of the bank moving into the territorial lines of Kansas City, and we believe under such circumstances, the said bank, under the terms of said Section 7944, would be entitled to and could lawfully continue its banking business with the amount of capital under which it operated prior to the extension of the territorial limits of Kansas City.

Section 7940, R.S. Mo. 1939, sets forth what shall be contained in the articles of incorporation of a bank. Subsection 5 thereof is as follows:

"The articles of agreement may designate the number of directors necessary to constitute a quorum, and may provide for the number of years the corporation is to continue, which shall not exceed fifty years, or may provide that the existence of the corporation shall continue until the corporation shall be dissolved by consent of the stockholders or by proceedings instituted by the state under any statute now in force or hereafter enacted."

Such Subsection 5, giving the right to a banking corporation to designate the period of its existence, not to exceed 50 years, and that part of Section 7942 directing the Commissioner of Finance to grant a certificate to the corporation to carry on the business of a bank, which said part of said Section 7942 is as follows:

"In case the commissioner shall find all the provisions of the law have been complied with and shall have satisfied himself by such investigation as to the facts as above provided, he shall grant a certificate setting forth that such corporation has been duly organized and the amount of its capital subscribed and paid up in full. Such certificate shall be recorded in the office of the recorder of deeds of the county or city in which the

corporation is to be located, and such certificate, so recorded, or certified copies thereof, shall be taken in all the courts of this state as evidence of such incorporation; and the existence of such corporation shall continue for the period limited in its articles of agreement, if there fixed, and if not there fixed, then until the corporation is dissolved by consent of its stockholders or until its corporate existence ends pursuant to the laws of this state."

and the certificate of authority itself granted by the Commissioner of Finance constitute the charter of the bank, during the period of time the incorporation of the bank is to exist.

We believe the statutes themselves would become a part of the franchise of the bank to carry on its business during the time of its incorporation. It is not a mere license. It is an undertaking of the state to protect the bank so long as it obeys the laws of the state. We do not undertake to say that the bank itself has a vested right in its franchise to carry on its business. Such right may be taken away from the bank for violations of its charter for ultra vires acts, or for any violation of the banking laws, or general laws of the state, or by liquidation. But third parties dealing with the bank, some of whom, as purchasers of stock in the bank, at a known figure of capital structure, persons who may and do contract with banks borrowing of its funds, and giving in security therefor pledges of their property, and persons whom the bank may owe, do, we think, have vested rights in the security of the permanent right of the bank under its charter from the state to carry on its business with the same amount of capital existing at the time of the granting of its franchise and during the time contracts between such third persons and the bank might be affected.

It would not be difficult to foresee that persons having contracts with a bank operating under a capitalization of \$25,000.00 might be greatly prejudiced and injured in their contracts with the bank, if, indeed, they might not be entirely destroyed, if the bank should be compelled, merely because a nearby city extended its corporate limits to include the territory in which the bank is located, to increase its capital structure to conform to the requirements of our statutes as to the amount of capital required for banks when first incorporated, according to population, in such cities.

The state itself, we believe would have no power, under any conditions, to require a bank to change its capitalization once established, even though the statutes under which it is incorporated, and its capital structure becomes fixed, are modified, or changed.

The Constitution of the United States, Section 10, of Article 1 provides:

"Powers denied the States. No State shall * * * * pass any * * * * law impairing the obligation of contracts, * * * * *"

Section 13 of Article 1, of the new constitution of this state is as follows:

"Sec. 13. Ex Post Facto Laws--Impairment of Contracts--Irrevocable Privileges. --That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

12 Corpus Juris under the title Constitutional Law, at page 1049, Section 677, in defining changes or modifications of statutes concerning banks or trust companies after such institutions have been incorporated states the following:

"* * * * and a statute is invalid which requires a previously chartered bank or trust company to change its name or very greatly increase its capital stock. * * * * *"

One of the most recent and instructive works on banks and banking is "Michie on Banks and Banking." The author of this work in Vol. I, treating the subject of the power of the Legislature to compel or modify banking laws affecting banks already incorporated, or to permit a bank itself to change or amend its articles of corporation, on page 87 of said work has this to say:

"Impairment of Obligation of Contracts.
--The power can not be exercised to impair the obligation of a contract, such as one which the corporation has entered into with a third party."

Footnote 55, is an excerpt from the case of Woodfork v. Union Bank, 43 Tenn. (3 Coldw.) 488, which states the following:

"Modification cannot impair contract. --The power of the legislature to change, modify, enlarge or restrain, a banking corporation,

is limited to such measures as are merely ancillary to the main design of the corporation. It can not repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judically, ascertained and declared. * * * *

On the question of the constitutional guarantees above quoted, as preventing the impairment of the obligation of a contract and in harmony with the above quoted text from Michie on banks and banking and the quoted excerpt from the Tennessee case, where it is held that contracts made and existing between a bank and third persons are likewise protected, and as furnishing the proper basis for holding that contracts with third parties are within the protection of the Constitution, we cite our Section 7906, Article 1, Chap. 39, R.S. Mo. 1939, which is as follows:

"Any bank or trust company organized under the laws of this state may, through action of its board of directors and without requiring any action by stockholders, with the written consent of the Finance Commissioner, issue and sell at not less than par its capital notes, if, at the time of the issuance of such capital notes the capital of such bank or trust company is impaired, and there shall have been issued and sold capital notes of such bank or trust company in accordance with the provisions of Sections 7906 to 7909 inclusive, in an amount equal to or more than the impairment of the capital of such bank or trust company, as found by the commissioner of finance, then the capital of such bank or trust company shall for all purposes be deemed to be restored and unimpaired. Such capital notes may be sold for cash or, with the written consent and approval of the commissioner of finance, for property and they shall be of a nature specified in, and conform to, the requirements of the several provisions of Sections 7906 to 7909 inclusive."

Assuming that a bank may suffer, from any cause, on impairment of its capital, and under said Sections 7906 to 7909, it should be required by the Commissioner of Finance, to issue its capital notes for the repairment of its capital or it should voluntarily issue them, and sell them, obligating itself to take up and discharge said notes as provided in said sections. This

was done after the bank holiday of 1933, and is still being done by banks. Such transactions would be with third parties in no way connected with the bank organization itself. We believe they would have the same constitutional protection against any state statute which would impair the obligations of their contracts with the bank, evidenced by such capital notes, as the bank itself would have growing out of its franchise contract with the state.

We do not find, in our research on this subject, any decision by the Appellate Courts of Missouri. We do find, however, a case decided by the Supreme Court of the State of Oregon, based upon quite similar facts to the proposed conditions which would exist in the present case, should the city of Kansas City, Missouri, extend its corporate limits on January 1, 1947, to take in Dodson, Missouri, where the "Peoples Bank of Suburban Kansas City" is located. The Oregon case is reported in 144 Pac., Page 452. The style of the case is Pacific Title & Trust Company v. Sargent, State Superintendent of Banks, et al.

The facts in that case were that two corporations, namely, Pacific Title and Trust Company and Oregon Realty and Trust Company were incorporated under the laws of the State of Oregon to do many things of the nature of banking, to hold real estate, and one of them, at least, was privileged to prepare and issue abstracts of title to real estate. These companies were incorporated under statutes very similar in terms to our Section 7940 and following sections providing for the incorporation of banks, including like terms and requirements as are contained in Section 7944 respecting the amount of capital to be provided by the corporation according to the population of the cities where such banks operate.

Sometime after the banks had been organized and were operating the State Superintendent of Banks of the State of Oregon sought to compel each of said institutions to drop the word "trust" from its respective corporate name. Injunction suits were filed by the two corporations to restrain the Superintendent of Banks and another from compelling them, under penal statutes of Oregon, to discontinue business. The two cases were consolidated and tried as one. The Circuit Court overruled demurres to the petitions and, the State Superintendent of Banks and others, party defendants, declined to plead further, and the court entered decrees restraining the defendants from interfering with the operations of said corporations, according to the prayers of the complainants. An appeal followed by the defendants to the Supreme Court of Oregon.

In affirming the judgments and decrees of the Circuit Court, the Supreme Court of that state in holding, l.c. 455, that

the State Superintendent of banks had no authority to revoke the charter of said institutions or compel them to discontinue the use of the word "trust" in their corporate names, the Supreme Court in its decision likened the effort of the Superintendent of banks to compel them to cease using the word "trust" to a possible effort to compel them to increase their capital stock. Of such an effort, had it been made, the court said:

" * * * * The same reasoning applies to the attempt to force them out of business unless they will multiply their capital tenfold. The terms of the contract between them and the state were accepted by the state. To arbitrarily require them to increase their capital stock would be to violate the terms of its contract as much as if A. should agree to sell a piece of property to B. for \$5,000, and when B. tendered the money to the former should require him to pay \$50,000. The exercise of the police power must be reasonable and have a rational application to the peace, health, and safety of the people, and must not violate any constitutional right. Primarily the exercise of the police power means regulation and not extinction. It would be properly applied in the present instance by such rules as would fairly operate to promote the observance of their charter powers and responsibilities by the plaintiffs without direct destruction or violation of their vested rights, but it would be unreasonable to enforce such regulations as would practically obliterate them or compel them to a breach of their own contracts lawfully made."

In the case of Gladney v. Sydnor, 172 Mo. Court 318, our Supreme Court had before it the question of the impairment of the validity of a contract involving "vested rights", l. c. 329 the court said:

" * * * * In the case of Bank v. Sharp, 6 How. 301, the doctrine is clearly announced that 'one of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of

encroaching in any respect on its obligation, dispensing with any part of its force.'

"The conclusions reached in this case that George W. Gladney had a vested right prior to the Act of 1895, and that such right can not be impaired by a subsequent statute and that if the Act of 1895 was intended to apply to him, it is retrospective in its operation and is in conflict with the organic law of this State, are supported by principles announced by this court, in analogous cases, and by conclusions reached in other States, in cases identical in principle with the one before us."

If, then, the state may not require a bank directly to change its capital structure, it certainly could not be held that it could be done indirectly by the Commissioner of Finance because of the change of boundaries of Kansas City, Missouri, to take in the territory of the smaller community where the said named bank is operating.

It would change the values of the contracts of the investors in the bank stock, and its operative contracts. It would impair the obligations of its contracts and, indeed, might very readily destroy them altogether. If an order were made upon the bank in question to increase its minimum capital to \$200,000.00, when and if the boundaries of Kansas City were extended to include the territory of the bank, and the stockholders would be unable to supply means to pay for the increased capitalization, and other investors could not be found who desired to purchase such stock, the bank would be required, we think to liquidate. This most certainly would impair the obligations of the contracts with all persons making contracts with the bank because in fact such contracts would be destroyed, and the business of the bank itself would be destroyed.

Our Section 7944 is a constructive not a destructive act. The intent of the Legislature in enacting that statute and other sections of the banking code evidently was and is to give sparsely populated communities the opportunity to have immediate banking facilities, and, moreover, to permit persons of moderate means to organize a bank in such a community with a minimum capital of \$25,000.00.

We further believe that the Legislature never intended by enacting said Section 7944 to require a bank in a community of 5,000 or less inhabitants to increase its capitalization merely because a city of 50,000 or more inhabitants should move out and take in the territory where such bank is operating.

CONCLUSION

It is, therefore, the opinion of this Department that: If the named bank, or any other bank, operating in a community of less than 5,000 inhabitants and which, under said Section 7944, may operate with a minimum capital of \$25,000.00, should be permitted to change its location to a city having 50,000 or more population, which city, under said Section 7944, requires a minimum cash capital of \$200,000.00, then the bank moving from the lesser inhabited community to the greater would be required to increase its minimum capital structure to \$200,000.00, and in addition thereto 40% thereof as is provided in said Section 7944.

It is the further opinion of this Department that: A bank established and doing business in a community in this state which, as to population, permits banks to operate with a minimum capital structure of \$25,000.00 would not be affected under said Section 7944, if a city having a population of more than 50,000 inhabitants should extend its corporate limits to include the location of such bank operating under a capital structure of \$25,000.00. The bank with the capitalization of \$25,000.00 could still continue to operate with that amount of capital notwithstanding the change in the city limits of a city.

Respectfully submitted,

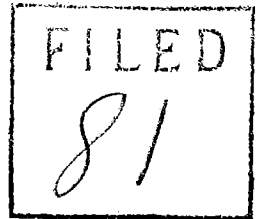
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

EDUCATION: IN RE: The State Board of Training Schools has, with the
SCHOOLS: approval of the Director of Public Buildings, the
authority to raze an unsafe building on the grounds
of one of the State Training Schools.

October 7, 1946



Mr. Louis J. Sharp
Director, Board of Training Schools
Capitol Building
Jefferson City, Missouri

Dear Mr. Sharp:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department as follows:

"We are again requesting the assistance of your office in interpreting the powers and duties of the State Board of Training Schools.

"Does the Board have the power to order the razing of an unsafe building on the grounds of any one of the three training schools? If the Board does not have this power, we should like to know which agency has this power.

"We ask this question because Mr. John F. Powell, State Building Director, at the request of the Board, has made an inspection of Marmaduke Cottage at Chillicothe, reports it in an unsafe condition, and recommends to the Board that it be razed. The building has not been used for some time except for storage purposes.

"We shall greatly appreciate your ruling in this matter.

"By order of the State Board of Training Schools."

At the outset and before a discussion of the authority of the State Board of Training Schools with regard to the question raised in your letter, we call your attention to the following provisions of Senate Bill No. 297, passed by the 63rd General Assembly and approved by the Governor. This bill sets up a division of public buildings, the head of which is the Board of Public Buildings,

consisting of the Governor, Attorney General and Lieutenant Governor of the State of Missouri. The Board appoints a Director of Public Buildings whose duties and authority, in those respects which are pertinent to the question before us, are set out below:

"(c) The Director shall inspect all buildings and report to the General Assembly at the commencement of each regular session upon their condition, maintenance, repair and utilization,

"(d) The Director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the Director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the Director.

"(e) The Director shall set forth reasonable conditions to be met and procedures to be followed in the repair, maintenance, operation, construction and administration of state buildings. The conditions and procedures shall be codified and filed with the Secretary of State in accordance with the provisions of the constitution. No payment shall be made on claims resulting from work performed in violation of these conditions and procedures, as certified by the Director."

The above provisions of Senate Bill No. 297, we think, require that the approval of the Director of Public Buildings be obtained by the heads of all departments before undertaking the work of constructing, maintaining, or rehabilitating buildings. Therefore, since the razing of Marmaduke Cottage at Chillicothe would, we think, be in the nature of a rehabilitation, it would be necessary to have the approval of the Director of Public Buildings before a contract could be let for this purpose.

We proceed now to the primary question of the authority of the State Board of Training Schools to initiate work on buildings under its jurisdiction and to carry such work forward with the approval of the Director of Public Buildings.

Senate Bill No. 347, passed by the 63rd General Assembly and approved by the Governor, created a State Board of Training Schools having charge and control of training schools and industrial homes in this state. The Industrial Home for Girls at Chillicothe is one of such schools and is so mentioned in the Act. Section 20, page 9 of Senate Bill No. 347 transfers the duties, regarding the training schools, which were exercised by the former commission of Penal Institutions, to the Board of Training Schools, in the following language:

"* * *In relation to any of the above named juvenile training schools, whenever the term commission of penal institutions is used in any act, it shall hereafter be understood to mean the state board of training schools."

Section 9009, R. S. Mo. 1939, reads as follows:

"There shall continue to be maintained at Chillicothe in the county of Livingston in this state an institution under the name and style of the 'State industrial home for girls.'"

Section 8972, R. S. Mo. 1939, reads, in part, as follows:

"The Department of Penal Institutions shall be under the control and management of a commission composed of three members, not more than two of whom shall belong to the same political party, who shall be known as Commissioners of the Department of Penal Institutions, and who shall have and exercise the powers, and perform the duties and functions in this article provided, and as otherwise authorized by law. The commissioners of the department of penal institutions shall reside in Jefferson City and devote their entire time to the duties of their respective offices. Said department of penal institutions shall have and exercise control and jurisdiction over all penal institutions in this state supported in whole or in part by the direct appropriation of money out of the state treasury, and more particularly over the Missouri training school for boys at Boonville, the state industrial home for girls at Chillicothe, the state industrial home for negro girls at Tipton, the intermediate

reformatory at Jefferson City and the state penitentiary and prison at Jefferson City, together with all real estate, buildings, machinery and personal property belonging to or used by, or in connection with, said penal institutions, or any thereof."

Section 8985, R. S. Mo. 1939, reads, in part, as follows:

"The commission of the department of penal institutions shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the intermediate reformatory for young men, the Missouri training school for boys, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said commission and said commission shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said commission, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article.* * *"

The above sections, we think, give the Commission of Penal Institutions adequate power to raze a building located on the property of the Chillicothe School. Since, by the terms of Senate Bill No. 347, the Board of Training Schools possesses the same power as the Commission of Penal Institutions, we think the Board has the power to raze a building at said Institution.

The right of a Board, having control and management of educational institutions, to determine whether money should be spent in necessary repairs on buildings of such institution, was upheld in State ex rel. Thompson v. Board of Regents of the Kirksville State Teachers College, 305 Mo. 57, 264 S. W. 698. The court in the case, in sanctioning the action of the Board of Regents of the State Teachers College in applying certain insurance money to repairs on buildings at the school, used the following language at l. c. 66:

"* * *In furtherance of its discretion it proceeded at once to expend a portion of the money thus received in repairs necessary for the protection of certain damaged buildings and to partially replace the library. When this writ was served the board was taking steps to replace the destroyed buildings. It is charged with no wrong doing or the usurpation of any power which has not at least received tacit legislative and public approval for a half century. These facts are entitled to more than persuasive consideration in determining the question here seeking solution. Absent qualifying incidents they may arise to the dignity of ruling decisions. (State ex rel. v. Gordon, 266 Mo. 412; Folk v. St. Louis, 250 Mo. 141.)* * *"

Decisions from other jurisdictions have authorized similar boards to take actions with regard to construction and maintenance of the buildings which form the plant of an education institution under no greater authority than is granted to the Board of Training Schools under our present law.

Brooks v. Shannon (1939) 86 Pac(2d) 792;
Woodson v. Kingman Co. (1939) 274 Pac. 728;
Hailey v. City (1928) 144 S. W. 377;
Ross v. City (1940) 290 N. W. 587.

The Ross case authorized the razing of a school building by a city under authority of a statute which granted to the city the control and management of the school.

CONCLUSION

It is, therefore, the opinion of this department that the state Board of Training Schools has the authority, subject to the approval of the Director of Public Buildings of the State of Missouri, to raze an unsafe building on the grounds of one of the training schools under its jurisdiction.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

SMITH N. CROWE, JR.
Assistant Attorney General

SNC:mw

**BANKING CODE--BOARD OF APPEALS:
IN INCORPORATION OF BANKS**

Senate Bill #196 recently
passed by the Legislature,
has no bearing upon, nor
does it interfere with the
duties of the Board of Ap-
peals in bank incorporation
matters provided for in Sec-
tions 7942 and 7943, because
said sections, with other
sections cited, provide for
a complete plan for appeal
and review by the Courts.

December 5, 1946

Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter of recent date, requesting an opinion from this Department as to whether Section 7943, R.S. Mo. 1939, making the Governor, the Attorney General and the State Treasurer a Board of Appeals in the application of the incorporators of a bank for a certificate to organize a bank has been amended, or if Senate Bill #196, has any effect thereon. Your letter reads as follows:

"Sec. 7943, R.S. Missouri 1939, provides that a Board composed of the Governor, Attorney General and the State Treasurer shall accept an appeal and render a decision in cases where this Department refuses to issue a new bank charter.

"Has there been an amendment to this section or does SB 196 have any bearing thereto?"

Section 7942, R.S. Mo. 1939, also states, in the last paragraph thereof, that the Governor, the Attorney General and the State Treasurer shall constitute such Board of Appeals, and is to be read in connection with said Section 7943.

Section 7942, R.S. Mo. 1939, was amended by the Legislature, Laws of Missouri, 1941, pages 671, 672, but there was no change with respect to the official personnel of the Board of Appeals. The amendment, Laws of Missouri, 1941, pages 671, 672, leaves the same paragraph and in the same words as were in said Section 7942 as it stood in the Revised Statutes of Missouri, 1939.

12-7
FILED
81

Section 7943, R.S. Mo. 1939, has not been changed at all. So that the amendment of the Session Acts of 1941 of said Section 7942, and the terms of said Section 7943 of the Revised Statutes of Missouri, 1939, remain identical as they were in the Revised Statutes of Missouri, 1939.

The writer has carefully checked the index of laws passed by the Legislature of 1945, and has also checked the table and list of Bills passed as affecting old statutes already in existence. We find that Section 7943, R.S. Mo. 1939, has never been amended since the revision of 1939. There was no amendment thereto in 1941 or 1945 by the Legislature.

That part of Section 7942, Laws of Missouri, 1941, pages 671, 672, providing for an application by incorporators of a bank under the banking laws of this State, is, in part, as follows:

"* * * In case the commissioner shall not be satisfied, as the result of such examination, that the character, responsibility and general fitness of the persons named in such articles of agreement is up to the standard above provided, or that the convenience and needs of the community to be served justify and warrant the opening of such bank therein, or that the probable volume of business in such locality is sufficient to insure and maintain the solvency of the new bank and the solvency of the then existing banks or trust companies in such locality, without endangering the safety of any bank or trust company in said locality as a place of deposit of public and private moneys; and on these accounts or any one of them shall refuse to grant the certificate of incorporation, he shall forthwith give notice thereof to the proposed incorporators from whom such articles of agreement were received; who, if they so desire, may within ten days thereafter appeal from such refusal to a board composed of the governor, the

attorney general and the state treasurer, which board shall within twenty days thereafter finally decide the matter, and the commissioner shall act in accordance with such decision but the decision of the board may be reviewed by the circuit court in the manner prescribed by Section 5690, R.S. 1939. Such board may prescribe rules and regulations for the proceedings in connection with such appeal."

It will be seen at once that that part of said Section 7942, Laws of Missouri, 1941, provides for not only an appeal from the Commissioner of Finance to the Board of Appeals, the personnel of which is the Governor, the Attorney General and the State Treasurer, but it also provides that their action may be reviewed by the Circuit Court in the manner prescribed by Section 5690, R.S. Mo. 1939.

Section 5690, R.S. Mo. 1939, was amended, Laws of Missouri, 1943, page 334, to give concurrent appellate jurisdiction with the Circuit Court to Common Pleas Courts in appeals in certain awards, decisions and determinations of the Workmen's Compensation Commission, the Unemployment Compensation Commission and the State Social Security Commission, and to issue writs of certiorari and the right to review findings and orders of the Public Service Commission of this State. But the amendment in nowise touched or affected the terms or provisions of said Section 7942, Laws of Missouri, 1941, pages 671, 672, providing for appeals to the Board of Appeals in such bank proceedings or the power of the Circuit Courts to review the decisions of the Board of Appeals composed of the Governor, the Attorney General and the State Treasurer. There still remains undisturbed and unamended, the complete scheme and plan for appeal and review as is contained in said Section 7942, Laws of Missouri, 1941, and in said Section 7943, Laws of Missouri, 1939.

Returning for the time to said Section 5690, R.S. Mo. 1939, which was, as above stated, undisturbed

and unchanged by the amendment of Laws of Missouri, 1941, giving the Common Pleas Courts jurisdiction therein, we find that said Section 5690 is a part of the procedure before the Public Service Commission and Courts having appellate jurisdiction over their proceedings. Having in mind the provisions of said Section 7942, that incorporators of a bank, aggrieved by the decision of the Board of Appeals provided for in said Section, may have such decision reviewed by the Circuit Court in the manner prescribed by Section 5690, R.S. Mo. 1939, we turn again to said House Bill #196.

This is a general statute or Act passed by the Legislature to meet the lack of the right to appeal or have a review made by the Courts of proceedings of some of the administrative bodies of this State already existing under the statutes.

Senate Bill #196 prescribes a comprehensive plan of procedure for appeals and review by the Courts in such matters as come before administrative bodies. The Act clearly defines "Agency", "Rule", "Contested case" as explanatory of the subjects to which said Act shall apply. Said Senate Bill #196 is quite too lengthy to quote here, but it is readily accessible to any one inquiring. Indeed, that is the only Section of said Senate Bill #196 that definitely and particularly applies to the question being pursued here.

We have already shown, we think, very clearly that there is a definite method of appeal and review set forth in the statutes hereinbefore cited and quoted in matters of the incorporation of banks.

This brings us to that part of said Senate Bill #196 which, we think, definitely controls this problem and points out that the Legislature was mindful in the enactment of said Senate Bill #196 that there already existed provisions in certain statutes providing for the appeals from and review of the activities of some of the administrative bodies, and in particular the one here, being considered, in this State by the Courts of this State when the legislative body came to incorporate Section 10(a) in said Senate

Bill #196. Said Section 10(a) is as follows:

"Section 10 (a) Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in this section, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this act contained shall prevent any person from attacking any void order of any agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision."

We believe that under the provisions of said Section 10(a) in Senate Bill #196, providing "* * * a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof as provided in this section, unless some other provision for judicial review is provided by statute; * * * " any person interested in bank incorporation cases would have the right to have the whole case reviewed by the Circuit Court under Section 7942, Laws of Missouri, 1941, and Sections 7943 and 5690, R.S. Mo. 1939, supra. Said sections are still in full force and effect in this State, and constitute full and adequate authority for "judicial review" of all proceedings in the matter of the incorporation, or the denial of the right to incorporation, in bank matters.

Section 7942, Laws of Missouri, 1941, pages 671, 672, and Sections 7943 and 5690, R.S. Mo. 1939,

constitute a special plan of the statutes dealing with a special subject. It is a complete scheme and plan for appeal and review of the proceedings of the Commissioner of Finance and the Board of Appeals in the matter of the incorporation of banks.

There is not a single word in Senate Bill #196 repealing outright, Section 7942, Laws of Missouri, 1941, pages 671, 672, or Section 7943, or Section 5690, R.S. Mo. 1939, or amending them or either of them, or calling them in question in any particular whatsoever.

Section 10(a) of Senate Bill #196 is a general statute dealing with general matters of appeal and review in proceedings had before administrative bodies, "* * * unless some other provision or judicial review is provided by statute; * * *".

59 C.J., pages 1057 and 1058, reciting the rule of construction of the effect of special statutes and general statutes on the same subject has this to say:

"* * * It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. * * *".

The Supreme Court of Missouri in the case of State vs. Imhoff, 291 Mo. 603, l.c. 617, on this question said:

"* * * We have said, not once, but a number of times, that where there are

two acts and the provisions of one have special application to a particular subject and the other is general in its terms and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter. * * * ".

Our Supreme Court in the case of State vs. Fidelity & Deposit Company, 296 Mo. 614, l.c. 626, on the same principle of law again said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." * * * ".

There is no conflict or repugnancy between Senate Bill #196 and Section 7942, Laws of Missouri, 1941, pages 671, 672, Section 7943 or Section 5690, R.S. Mo. 1939. They should be read together to give

effect to the first said three sections as a special law and the last, Senate Bill #196 as a general law on the same subject. Neither is there any repeal by implication in the enactment of Senate Bill #196 of the terms and provisions for appeal and review of the actions of the Board of Appeals as an administrative body created by said Section 7942, Laws of Missouri, 1941, pages 671, 672, or Section 7943, or Section 5690, R.S. Mo. 1939.

59 C.J. on this subject, page 912, states the rule as follows:

"* * * Obviously, there is no implied repeal on the ground of inconsistency or repugnancy where there is no conflict, antagonism, inconsistency, or repugnancy between the acts in question, as where the later act is merely affirmative, cumulative, or auxiliary. * * *".

The Supreme Court of Missouri in giving effect to the rule hereinabove stated in Corpus Juris, in the case of State vs. Fiala, 47 Mo. 310, said: (l.c. 320):

"Repeals by implication are not favored. The rule in this State may be regarded as settled that a general statute, although inconsistent with the provisions of a prior law, will not repeal the latter unless there is something in the general law, or in the course of legislation upon its subject-matter, that makes it manifest that the Legislature contemplated and intended a repeal. * * *".

Our Supreme Court again considering the same rule and principle of law, in the case of State vs. Buder, 315 Mo. 791, l.c. 797, again affirmed the same rule by saying:

"* * * The repeal of statutes by implication is not favored by the

courts, and the presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. * * * "

A repeal by implication may only be effected when absolutely necessary.

This was the holding by our Supreme Court in the case of White vs. Greenway et al., 303 Mo. 691, l.c. 697, 698, where the Court held as follows:

"A repeal occurs by implication only when necessity demands it. (State ex rel. v. Wells, 210 Mo. l.c. 620; Manker v. Faulhaber, 94 Mo. 440; 26 Cyc. pp. 1073-1077.) The opinion in the Wells Case quotes from a textbook, as follows:

"A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy." (Anderson's Law Dict., p. 879.)

"In the Manker Case it was said that before a later act could repeal a former, 'the two acts must be irreconcilably inconsistent,' or it must appear that the Legislature

intended by the act to prescribe the only rule that would govern in the case."

Our Supreme Court expressed its continued adherence to the support of the rule that a repeal of one statute by implication, by the enactment by another statute, must be a necessity, in the case of State vs. Wells, 210 Mo. 601, l.c. 620, when it said:

"* * * 'A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' * * *".

We must then conclude that if Section 7942, Laws of Missouri, 1941, pages 671, 672, together with Sections 7943 and 5690, R.S. Mo. 1939, provide a complete and adequate plan of appeal in, and review of, the actions of the Commissioner of Finance, and the Board of Appeals, composed of the Governor, the Attorney General and the State Treasurer of the State of Missouri, in the matter of the incorporation, or refusal to permit the incorporation, of banks, Senate Bill #196 does not in any way affect the actions of the State officers named or the validity of the said statutes authorizing and providing for the exercise of such administrative duties and functions.

We believe that Senate Bill #196 is supplementary to and in aid of Section 7942, Laws of Missouri, 1941, pages 671, 672, and Sections 7943 and 5690, R.S. Mo. 1939, and is not in conflict therewith. Senate Bill #196 does not have any effect or bearing upon the

Honorable H. G. Shaffner -11-

above quoted Sections of law of 1941, or the Revised Statutes of Missouri, 1939, on the subject matter of this inquiry, because said Sections provide for a complete plan of appeal and review of matters concerning the incorporation of banks.

Since Section 10(a) of Senate Bill #196 specifically exempts such administrative bodies where there were provisions by law for appeal and review when said Senate Bill #196 was enacted, the duties and functions of said Board of Appeals in bank incorporation proceedings are not affected in any manner whatsoever by the terms of said Bill.

CONCLUSION.

It is, therefore, the opinion of this Department that:

1) Senate Bill #196 recently passed by the Legislature, has no bearing upon, nor does it in anywise interfere with the functions and duties of the Board of Appeals consisting of the Governor, the Attorney General and the State Treasurer, in matters of the incorporation of banks as provided for in Section 7942 and Section 7943, R.S. Mo. 1939.

2) There is no amendment of any kind in our statutes changing or interfering with the duties of said Board of Appeals as provided in said last numbered sections of R.S. Mo. 1939.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

GWC:ir

TAXATION: Scheme of taxation of national and domestic banking corporations provided in House Bill No. 888 is in lieu of all other taxes which might be imposed upon the tangible and intangible personal property of such corporations.

April 30, 1946



Honorable William B. Shirley
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"I see by the morning paper that House Bill No. 888 has been passed by the House and signed by the Governor.

"Section 11 provides 'It is the purpose and intent of the General Assembly to substitute the tax provided by this Act for the tax on bank shares which was imposed by Section 10959, Revised Statutes of Missouri, 1939, and for all taxes on all tangible and intangible personal property of all banking institutions subject to the provisions of this Act, and for all property taxes on the shares of such banking institutions'.

"Query. Should tangible personal property of banking institutions such as fixtures be included in the assessment lists that they are to return to the County Assessor at this time?"

House Bill No. 888, referred to by you in your letter of inquiry, was signed by the Governor on the 23rd day of April, 1946. It does not become operative, however, until July 1, 1946, as is provided by Section 13 of the Act.

The rule with respect to the construction of statutory enactments has been declared by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S. W. (2d) 12, 1. c. 15, from which we quote:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration." Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. 2d 920, 925; Artophone Corporation v. Coale, 345 Mo. 344, 133 S. W. 2d 343."

In accordance with this rule, we think it might be well to examine the historical background of Section 10959, R. S. Mo. 1939, which is referred to in Section 11 of House Bill No. 888. Such statute reads, in part, as follows:

" * * * Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business: Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or

business company in excess of forty per cent of the capital, surplus and undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided:
* * *

In construing a prior enactment of this statute, which appeared as Section 12775, R. S. Mo. 1919, the Supreme Court of Missouri said in *State ex rel. v. Gehner and State ex rel. v. Same* (combined cases), 5 S. W. (2d) 40, 1. c. 43:

"The history, development, and purpose of the foregoing legislation, federal and state, respecting the assessment and taxation of shares of the capital stock of banking corporations, has been thoroughly and exhaustively reviewed in the prior decisions of this court. *State ex rel. Miller v. Shryack*, 179 Mo. 424, 78 S. W. 808; *State ex rel. Koeln v. Lesser*, 237 Mo. 310, 326; 141 S. W. 838; *State ex rel. Campbell v. Brinkop*, 238 Mo. 298, 145 S. W. 444; *State ex rel. Johnson v. Buder*, 295 Mo. 63, 242 S. W. 979; *State ex rel. Orr v. Buder*, 308 Mo. 237, 271 S. W. 508, 39 A. L. R. 1199.

"In *State ex rel. Miller v. Shryack*, supra, Marshall, J., speaking for this division of this court, in discussing the purpose and intent of our state statute aforesaid, said (179 Mo. loc. cit. 440 (78 S. W. 812)):

"The conclusion is inevitable that the true meaning of the act of 1895 (now section 12775, R. S. Mo. 1919) is, that the real estate shall be assessed against the (bank) corporation, the personal property of the corporation shall not be assessed at all, and the shares of stock shall be assessed in the names of the shareholders. Thus the domestic (bank) corporations and the national banks are put on the same basis, there is no discrimination and the letter and form and substance of the power conferred by the federal statute are observed. The bank in question is a domestic

bank, but the law is the same as to it that it is as to national banks. After the assessment is thus made against the shares of stock in the names of the shareholders, it is legal to make the bank pay the tax and recover it from the stockholders. Section 9155, R. S. 1899; First National Bank v. Commonwealth, 9 Wall. 353 (19 L. Ed. 701); Aberdeen Bank (First Nat. Bank) v. Chehalis Co., 166 U. S. 440, 17 S. Ct. 629, 41 L. Ed. 1069). (Parentheses ours.)

"In State ex rel. Orr v. Buder, 308 Mo. 237, 244, 271 S. W. 508, 509 (39 A.L.R. 1199), White, J., speaking for this court, in banc, said:

"Section 12775, Revised Statutes 1919, for the purpose of taxation, divides corporations into two classes; it provides that "the property of manufacturing companies and other corporations named in Article VII, Chapter 90, * * * shall be assessed and taxed as such companies or corporations in their corporate names." It then provides that banks and other institutions doing a banking business shall list to the assessor all shares held therein at their face value, and the value of the real estate represented by such shares of stock, and "all other values", belonging to such corporation. The real estate owned by such corporation is assessed to the corporation, and "all other values" so listed are valued at their "true money value", as the values represented by such shares of stock, for the purpose of taxing them. The tax on such shares is first paid by the corporation which is reimbursed by the shareholders. Thus the shares in (the) corporations first mentioned are not taxed, but the corporations pay the tax on all taxable property held by them. The tax on shares of stock in banks, and in associations doing banking business, is paid by the shareholders. Under an Act of Congress, a state is authorized to tax the shares in national banks at their actual value. Van Allen v. Assessors, 3 Wall. 573 (18 L. Ed. 229); State ex rel. v. Shryack, 179 Mo. 1. c. (loc. cit.) 439 (78 S. W. 808); State ex rel. v.

Lesser, 237 Mo. l. c. (loc. cit.) 326 (141 S. W. 888). Under the authority of that Act of Congress, section 12775, Revised Statutes (Mo.) 1919, provides for taxing shares of stock in a bank, or an association doing banking business, in the manner mentioned.'" (Emphasis ours.)

Examining House Bill No. 888 in connection with this previous construction placed upon Section 10959, R. S. Mo. 1939, referred to in the Act itself, we discover a close similarity. The more important changes are simply to require the filing of the return of taxable property with the director of revenue rather than with the local assessor, and the enactment of some additional clarification matters relating to the computation of income and the allowance of deductions. We reach the conclusion that the intent and purpose of the Act was simply to transfer from the local assessor to the director of revenue the duties imposed with respect to the assessment of the corporation owned property and to specifically enumerate items of income and of deductions which might be charged thereagainst in order to determine the proper valuation for imposition of the tax. No substantial change appears with respect to the method of computing the tax itself, and with respect to the tangible and intangible personal property owned by the corporation the statement found in Section 11 of House Bill No. 888 is but declaratory of what had been the law for many years, as exemplified in the Gehner case, cited supra. Said Section 11 has been quoted by you verbatim in your letter of inquiry and is not set out herein again.

CONCLUSION

In the premises, we are of the opinion that the tangible personal property of either domestic or national banking institutions is not to be included in the assessment lists to be returned to the county assessor, in view of the declaration of the General Assembly, found in Section 11 of House Bill No. 888, that the tax imposed under other sections of such Bill is to be in substitution of "all taxes on all tangible and intangible personal property of all banking institutions subject to the provisions of this Act."

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

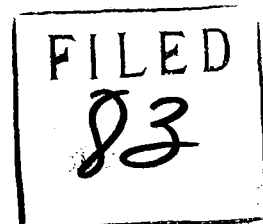
WFB:HR

STATE PURCHASING AGENT: The State Purchasing Agent may execute a
CONSTITUTIONAL LAW: lease of real property for the Unemployment Compensation Commission of Missouri for a period of time which exceeds two years, provided that the terms of the lease called for payment of rent for the whole period within the appropriation period in which the lease is executed.

February 4, 1946

OPINION NO. 83

Mr. William L. Smith
Purchasing Agent
State Capitol Building
Jefferson City, Missouri



Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date in which you requested an opinion of this department regarding your authority to execute a lease of real property for the Unemployment Compensation Commission of Missouri. As we read your letter the questions presented are as follows:

- (1) Is the State Purchasing Agent limited to a one year fiscal period in executing a lease of real property for the Unemployment Compensation Commission of Missouri?
- (2) Is the State Purchasing Agent authorized by law to execute a lease of real property for the Unemployment Compensation Commission of Missouri, the terms of which provide for the payment of rent by the Conservation Commission at stated intervals extending beyond the appropriation period within which the lease was executed?
- (3) Is the State Purchasing Agent authorized by law to execute a lease of real property for the Unemployment Compensation Commission of Missouri, the terms of which provide for the payment of rent in a lump sum during the appropriation period within which the lease was executed, when such lease is for a longer period than said appropriation period?

Section 23, Article IV, Constitution of 1945, reads as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year.

The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

This section of the Constitution of 1945 gives the General Assembly the right to make appropriation for either one or two fiscal years. The fiscal year of the state is, by the same section, fixed as the twelve months period beginning on the first day of July in each year. The Legislature of Missouri thus has an option of making appropriations for a period of two years beginning on the first day of July of any year, instead of making such appropriation for only one year.

Section 28, Article IV, Constitution of 1945, reads as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The last sentence of this section prohibits the incurring of any obligation, which is to be paid for out of an appropriation, after the fiscal period to which it relates. Since the Legislature may, if it so desires, make a two year appropriation, the State Purchasing Agent would be authorized to execute a lease for a two year period if the Legislature had enacted an appropriation for a two year period, and the appropriation bill provided for the payment of rents under a lease out of said appropriation. However, if the appropriation out of which said rents could be paid, was for a period of one year only, the State Purchasing Agent could not execute a lease for a period

of more than one year, unless the entire rent was to be paid within the one year appropriation period. (See discussion of question 3, this opinion.)

Section 39, Article III, Constitution of 1945, provides in part as follows:

"The general assembly shall not have powers:

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; (Ibid.)"

Under the above section the State Purchasing Agent would not be authorized to make any contract without express authority of law.

In *White v. Jones* (1944) 177 S.W. (2d) 603, 352 Mo. 359, the Supreme Court of Missouri had before it the question of the validity of a lease executed by the Board of Managers of the State Eleemosynary Institutions and the State Purchasing Agent for eighty acres of land adjoining State Hospital No. 3 at Nevada, Missouri. The lease was a six year lease providing for an annual rental of \$320.00 per year, payable on or before June 10th of each year. The lessor brought an action for damages for breach of a lease agreement and for a declaration of rights and obligations under the lease. The court held that the state was not liable for the breach of any of the agreements in the lease which created obligations accruing after the two year period subsequent to the passage of the appropriation act under which the lease was made. The court in that case said: (l.c. 606)

"Section 48 of Art. 4 of the Constitution of Missouri, relied upon by appellants, expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law and provides that all such unauthorized agreements or contracts shall be null and void. While Section 14590, supra, expressly authorized the state purchasing agent to negotiate leases, there is no express authorization for him to incur obligations for rentals or otherwise that will fall due and become payable after the lapse of two years from the date of the passage of the appropriation out of which said indebtedness is to be paid. * * *"

Section 48, Article IV, Constitution of 1875, referred to in *White v. Jones* was the same provision which we find in Section 39(4) of Article III, Constitution of 1945.

The court also based its decision on Article X, Section 19 of the Constitution of Missouri, 1875. The court said: (l.c. 606)

"* * * No part of that appropriation was intended for the rentals or other obligations accruing more than two years after the passage of the appropriation act. Article 10, Section 19, Constitution of Mo. There was, therefore, no appropriation for these subsequently accruing rentals, nor for any obligations subsequently arising under Sections 3 and 4 of the lease, and the lease incurring these obligations was wholly unauthorized. Section 9265, supra; Chapter 105, supra; See, concurring opinion, State ex rel. St. Joseph Water Co. v. Geiger, 246 Mo. 74, 83, 93, 154 S.W. 486; L.R.A. 1916A, 1060."

Article X, Section 19, Constitution of 1875, referred to in the opinion, provided that no money should be paid out of the treasury more than two years after the passage of the appropriation act out of which the payment was to be made.

The only difference between Section 19, Article X, Constitution of 1875 and Section 28, Article IV, Constitution of 1945, with regard to the point under discussion, is that the latter provides that an obligation can not be incurred after the fiscal period to which the appropriation relates, instead of providing that the obligation shall not be incurred after a period of two years from the passage of the appropriation act. Therefore, with regard to the point ruled in White v. Jones, supra, the Constitutional provision under which that case was decided is the same as that found in Section 28, Article IV, Constitution 1945.

The holding of the court in the White case, supra, that an appropriation can not be applied to years other than those for which it is made, was also held in State ex rel. McGrath v. Seibert (1890), 103 Mo. 401, State ex rel. Missouri State Agriculture v. Holladay (1877), 64 Mo. 526, and State ex rel. Broadwater v. Seibert (1889), 99 Mo. 122.

The White case, therefore, makes it clear that (1) the State Purchasing Agent is not authorized to incur obligations for rentals that will fall due and become payable after the appropriation act within which the lease was executed; (2) that an appropriation can not be used for rentals accruing after the appropriation period within which the lease was made.

The case of White v. Jones, supra, requires a negative answer to the second question raised by your letter.

The question which remains however, is that of whether the State Purchasing Agent could make a lease for a term longer than the appropriation period within which the lease was made if the payment of all the rent was to be made within that period. We are

of the opinion that the State Purchasing Agent would have this right. In *State ex rel. St. Joseph Water Co. v. Geiger* (1912), 246 Mo. 74, the court ruled on the validity of a contract to supply water to State Hospital No. 2 at St. Joseph, Missouri, which contract was for a period of ten years and which was executed, on the part of the state, by the Board of Managers of the State Eleemosynary Institutions. The main opinion of the court decided the case on a ground other than the validity of the ten year contract, but a reading of the opinion indicated that the court felt that the contract was valid in its inception even though it was later abrogated by an inclusion of the state hospital within the boundaries of the City of St. Joseph. The concurring opinion of Woodson, J., however, dealt directly with the question of the validity of the ten year contract. Judge Woodson, at l.c. 100, said:

"We are, therefore, of the opinion, that the eleemosynary institutions of the State are public corporations and are embraced within the provisions of Sec. 12, Art. 10 of the Constitution, and that the contract made and entered into, by and between the water company and the board of managers of Hospital Number 2 was valid when made, * * * *"

The *Geiger* case, *supra*, was reversed in *State ex rel. v. Eastin* (1917) 270 Mo. 193, insofar as it dealt with the abrogation of a contract by the extension of city limits to include the State Hospital No. 2 at St. Joseph, Missouri. The *Eastin* case was a case in which the facts arose out of the same transaction as that dealt with in *State ex rel. Geiger, supra*. In the *Eastin* case the St. Joseph Water Company sued, at the completion of their contract in 1915, for the price of water furnished from 1910 to 1915 to State Hospital Number 2 at the rate of ten cents per one thousand gallons, as provided in the contract with the Board of Managers of the State Eleemosynary Institutions, which was held in the *Geiger* case to have been abrogated by the extension of the St. Joseph city limits. The court in the *Eastin* case held that the Water Company was entitled to be paid on the basis of their contract made with the Board of Managers. They thus held that the ten year contract was a valid contract. The court said: (l.c. 209)

"* * * We are only holding here upon the case made, that the contract was upon its face valid and binding (*State ex rel. v. Geiger*, 246 Mo. l.c. 100), and that it was not abrogated by the ordinance extending the city limits of the city of St. Joseph so as to include the State Hosptial for the Insane, and that upon the admitted allegations of the alternative writ the demurrer should have been overruled. * * *"

The same sanction of long term contracts made by officers of the state government is, we think, found in *Aslin v. Stoddard County* (1937) 106 S.W. (2d) 472, 342 Mo. 148. In that case the court approved a contract made by a county court for the hiring of a janitor for a number of years which exceeded the term of the said county court. The provision of the statute, under which the court held that the county court had authority to make such a contract, provided that the county court "shall have control and management of the property, real and personal, belonging to the county" (Section 2078, R. S. Mo. 1929, M.R.S.A. Section 2078, p. 2658). This provision gives, we think, no more authority to the county court with regard to the management of real and personal property than Section 14590, R. S. Mo. 1939, Mo.R.S.A., p. 706, gives to the State Purchasing Agent with regard to the right to lease real property for departments of the state government. With reference to the authority of the county court the Supreme Court of Missouri in the *Aslin* case said: (l.c. 475)

"* * * This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express power granted. * * *"

From the foregoing cases, we are of the opinion, that the third question raised by your letter should be answered in the affirmative.

CONCLUSION

It is, therefore, the opinion of this department (1) that the Legislature may appropriate money for a period of either one or two years; (2) that the appropriation period referred to in section 28 of Article IV, Constitution of 1945, means the fiscal period of one or two fiscal years as designated by the General Assembly in the appropriation act; (3) that the State Purchasing Agent is unauthorized to execute a lease of real property for the Unemployment Compensation Commission of Missouri, the terms of which provide for the payment of rent by the Conservation Commission at intervals which extend beyond the appropriation period within which the lease was executed; (4) that, in such case, the lease would be binding upon the Commission only to the extent of the rental payments which came due within the appropriation period; (5) that the State Purchasing Agent is authorized to

Mr. William L. Smith

- 7 -

execute a lease of real property for the Unemployment Compensation Commission of Missouri, the terms of which lease provide for the entire rent in a lump sum during the appropriation period within which the lease is executed, even though the lease is for a rental period extending beyond the end of the appropriation period within which the lease was executed.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

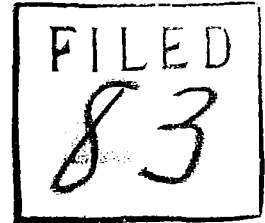
SNC:dc

COUNTIES: There is no reason nor authority for the county court to take out liability insurance on the employees of the county who work on the public roads of the county.

COUNTY COURTS:

Filed: #83

February 14, 1946



Honorable J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date in which you request an opinion of this department as to whether or not the county court of Webster County can purchase liability insurance covering injury or death to employees working on the public roads of the county. We are of the opinion that your letter raises two questions:

- (1) Is the county authorized to purchase such liability insurance?
- (2) Is there any need for the county to purchase said insurance?

Under date of May 9, 1939, this department issued an opinion to Honorable John W. Mitchell, Assistant Prosecuting Attorney of Buchanan County, Missouri, in which the questions presented by your letter were ruled upon. We are of the opinion that this 1939 opinion correctly states the law and we are in accord with the conclusion of that opinion. We enclose a copy of said opinion for your examination.

A diligent search of the Missouri statutes, as they appear at the present date, reveals no authority by which the county court of a county may undertake to purchase liability insurance other than Section 3713 of the Missouri Workmen's Compensation Act (said Act is discussed later in this opinion).

Furthermore, in a search for law relative to question one as set out above in this opinion, we find the case of Hartford Accident Indemnity v. Wainscott (1933) 19 Pac. (2d) 328. This case dealt with the question of whether or not a county could purchase liability insurance to protect it against claims for injury to persons or property attributable to the negligence of the county or its agents. In that case the insurance contract protected the county against liability for property damages or personal injury to its employees

or others occasioned by the operation of a fleet of motor vehicles owned by the county. The contract also provided that, where the automobile was used for "'pleasure and business' or 'commercial' purposes", the policy should be extended to cover as additional assured, "any person or persons while riding in or legally operating any such automobile and any person, firm or corporation legally responsible for the operation thereof (excepting always, a public garage, automobile repair shop and/or sales agency and/or service station, and the proprietors, agents, or employees thereof), provided such use or operation is with the permission of the named assured or, if the named assured is an individual, with the permission of an adult member of the assured's household, other than a chauffeur or domestic servant" (1. c. 329).

The court said: (1. c. 330)

"(2) The second and, indeed, the vital question in the case is whether or not there was any authority of law whatever for the payment of money out of the treasury of Maricopa county for public liability or property damage insurance as defined in the policy on motor vehicles owned by the county. It is contended by plaintiff, and, indeed, admitted by defendant, that neither the state nor any political subdivision thereof, which last term obviously includes counties, is liable for the negligence of its agents when such agents are engaged in a governmental function. * * * *"

In answering its own question the court stated that a county is the local subdivision of a State or territory, possessing only such powers as the state gives it, and that it can incur no liabilities except in pursuance of law (1. c. 330). The court further held that the use of the trucks by the County of Maricopa was for a governmental purpose and not a private purpose, and, therefore, the facts in that case would not bring the case within the exception to the general rule that counties are not liable for negligence of its agents, the exception being that they may be liable where they are engaged in a non-governmental function.

The court said: (1. c. 331)

"(10) But, say defendants, even though the county would under no circumstances be liable itself for the use of the motor vehicles in question, and therefore not authorized to

purchase insurance which protected only it against a liability which did not exist, the provisions of the policies in question also protect its employees against liability for torts committed by them while using county property. So far as actual injury to the employees of the county themselves is concerned, they are protected fully by the Workmen's Compensation Law (Rev. Code 1928, Sec. 1391 et seq.). We think it is going too far to say that the county is authorized to insure any of its employees against liability to others for their own wrongful conduct."

The court thus held that the county was not authorized to purchase insurance which protected it only against a liability that did not exist. It will be noted that that part of the above quotation which deals with injuries to employees of the county refers to the contention of the defendant that the insurance contract provided that the employees themselves were to be additionally assured. This situation is, of course, different from that which we are discussing in this opinion for the reason that we are here dealing only with the question of the protection of the county itself. Therefore, the injection of this matter into the opinion of the Arizona court does not change the holding of the court with regard to the question presented by your letter, i.e., that a county is not authorized to purchase insurance protecting it only against a non-existent liability.

We are, therefore, of the opinion that the first question must be answered in the negative.

An additional aspect of this entire question of the purchase of liability insurance by the county is that of whether there is any need for such insurance. We refer you to our 1939 opinion in this regard. That opinion cites cases showing that a county is a territorial subdivision of the state and that its powers, duties and functions are derived from the state. Further cases in this regard are *McClellan v. City of St. Louis* (1943) 170 S. W. (2d) 131, and *Zoll v. St. Louis County* (1938) 124 S. W. (2d) 1168, 343 Mo. 1031. The 1939 opinion also cites cases showing that the county is not liable in tort for the negligence of its agents or officers. The case of *Cassidy v. City of St. Joseph*, 247 Mo. 197, was a case in which the plaintiff was suing for damages for the death of her husband, an employee of the city. The Supreme Court of Missouri reversed an order of the Circuit Court granting a new trial after a verdict for the defendant city. The decision was based on the non-liability of the city in tort and the court, in discussing the rule, mentioned counties and other political subdivisions, as well as cities, as being

included within it. This case shows the rule is just as applicable where the injury or death of an employee is involved as where the injury or death is to one not employed by the political subdivision. Recent cases have reiterated the proposition regarding the liability of counties in tort.

In Zoll v. St. Louis County, supra, the court said:
(1.c. 1040)

"The courts of this State have consistently held that, absent consent of the State, its agencies cannot be sued in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in Hannon v. St. Louis County, supra."

In Todd v. Curators of Mo. University (1940) 147 S. W.
(2d) 1063, 347 Mo. 460, the court said: (1.c. 464)

"(2) In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. (Cohran v. Wilson 287 Mo. 210, 229 S. W. 1050; Dick v. Board of Education (Mo.), 238 S. W. 1073; Krueger v. Board of Education, 310 Mo. 239, 274 S. W. 811, 40 A. L. R. 1086; Robinson v. Wash-tenaw, Circuit Judge, 228 Mich. 225, 199 N. W. 618; Reardon v. St. Louis County, 36 Mo. 555; Clark v. Adair County, 79 Mo. 536; Moxley v. Pike County, 276 Mo. 449, 208 S.W. 246; Lamar v. Bolivar Special Road District (Mo.), 201 S. W. 890; State ex rel. v. Allen, 298 Mo. 448, 250 S. W. 905; Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. (2d) 1168; Bush v. State Highway Commission, 329 Mo. 843, 46 S. W. (2d) 854; Broyles v. State Highway Commission (Mo. App.), 48 S. W. (2d) 78; Arnold v. Worth County Drainage District, 209 Mo. App. 220, 234 S. W. 349; D'Arcourt v. Little River Drainage Dist. 212 Mo. App. 610, 245 S. W. 394.)"

In White v. Jones (1944) 177 S. W. (2d) 603, 352 Mo. 354, the court, on motion for rehearing, said: (1.c. 361).

"* * * *Reliance is placed on Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. (2d) 1168, 1173, where the court said: 'The

courts of this state have consistently held that, absent consent of the state, its agencies cannot be used in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in Hannon v. St. Louis County, supra It is the prerogative of the state to determine when suit may be maintained against it or its agencies and when not.'

*****"

In Hannon v. St. Louis County (1876) 62 Mo. 313, referred to in White v. Jones, supra, the court held that a county was liable in damages for injuries when it was in the position of a landlord and owed a duty to persons who came on its property. That case, therefore, is not contrary authority on the proposition regarding tort liability as stated in the other cases. The Hannon case is not pertinent to the instant situation.

We think the authorities just cited, together with those in the opinion of May 9, 1939, show conclusively that a county is not liable in tort for the negligence of its agents or officers where the injury occurring arises during the exercising, by a county, of governmental functions. We are of the opinion that the hiring of employees to work on the roads of the county is unquestionably in the exercise of a governmental function and would, therefore, fall within the rule laid down by the authorities.

As an additional reason sustaining our position that there is no need for the county to purchase liability insurance, we refer you to Section 3693, R. S. Mo., 1939, Mo.R.S.A. Section 3693. Said section provides that the provisions of the Chapter on Workmen's Compensation shall not apply to county employments, but in the fifth part of that section, it is further provided that any employer exempted in Section 3693, may bring himself within the provisions of the chapter by filing with the Commission a notice of his election to accept the same. The county, therefore, may elect to come under the provisions of the Missouri Workmen's Compensation law. Such an election would effectively provide for compensation to employees of the county in case of their injury or death, subject, of course, to the limitations found in Chapter 29, of the Revised Statutes of Missouri, 1939.

We call your attention to the fact that we have, in this opinion, distinguished between the carrying of insurance under the provisions of the Workmen's Compensation Act (Sec. 3713, R. S. Mo. 1939, Mo. R.S.A. Sec. 3713) and the purchasing of insurance without an election to come under the provisions of the Workmen's Compensation Act. Section 3713, supra, compels

Honorable J. P. Smith

-6-

the employer to carry insurance covering all liability, unless the employer is able to carry said liability without coverage. Therefore, if the county elected to come under the provisions of the Workmen's Compensation Act, the county, of course, could purchase liability insurance.

We are, therefore, of the opinion that the second question must also be answered in the negative.

CONCLUSION

It is, therefore, the opinion of this department that (1) the County Court of Webster County is unauthorized to purchase liability insurance to protect the county against liability in case of injury or death to employees of the county who are working on the public roads of the county for the reason that (a) there is no express authority therefor and, (b) the liability is non-existent; (2) there is no need to purchase such insurance because (a) the county would not be liable in a tort action for injury or death to said employees and, (b) the county may provide compensation to its employees by electing to come under the provisions of the Missouri Workmen's Compensation Act.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

Encl.

SHERIFF:

JUVENILE

DELINQUENTS:

Sheriff entitled to no allowances for boarding juveniles held by him unlawfully. Sheriff entitled to \$1.25 per day per person for boarding said juveniles if they are held upon formal complaint or information and are being investigated prior to commitment, otherwise to not more than 75¢, amount to be set by county court.

March 12, 1946

FILED

83

Honorable Forrest Smith
State Auditor
State Capitol Building
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department, as follows:

"We request your official opinion as to the legality of charges, in the amount of \$1.25 per person per day, made by the sheriff of Clay County to the Clay County Court for boarding juveniles held by him in a portion of the county jail building away from the regular prisoners and held without ordinary arrest or commitment.

These juveniles are persons turned to the sheriff by the county welfare officer pending investigation as to their supposed delinquency.

The rate established by the county court for boarding prisoners confined in the county jail is seventy-five cents per day. (Section 13416, R.S. Mo., 1939)."

Article X, Chapter 56, Sections 9696 to 9718, R.S. Mo., 1939, deals with the detention, commitment and trials of delinquent minors in counties of 50,000 inhabitants or less. Clay County falls within this classification.

Section 9701, reads, in part, as follows:

"When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition

in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. * * *

Section 9702, provides that a summons shall be issued requiring the appearance of the child after the filing of the petition. The last part of that section provides as follows:

"* * * If any person summoned, as herein provided, shall fail without reasonable cause to appear and abide the order of the court, or to bring the child, such person may be proceeded against as in the case of contempt of court. If it shall appear to the satisfaction of the court that there is no person in charge or care of the child, the court may order the sheriff to take control of the child and bring him into court."

Section 9703, relating to the court proceedings in delinquent cases, reads, in part, as follows:

"* * * Pending the disposition of any case, the child may be retained in the custody of the person having charge of the same, or may be kept in some place of detention provided by the county, or by any association having for one of its objects the care of delinquent or neglected children, or in such other custody as the court may direct; but in no case shall any child be placed in a jail, common lockup or other place where said child can come in contact at any time or in any manner with adults convicted or under arrest. In all cases wherever possible the child shall be left in the custody of relatives pending hearing in court."

Section 9710, reads as follows:

"Whenever there is to be a child brought before the court under this law, it shall be

the duty of the clerk of said court to so notify the probation officer in advance. It shall be the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court at the hearings of all cases, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after hearing, as may be directed by the court. Probation officers shall have all the powers of peace officers anywhere in the state for the purpose of this article."

A thorough investigation of the statutes reveals no procedure for the handling of delinquent minor cases other than that indicated by the above quoted sections. The statutes, therefore, require that a complaint be lodged and that a petition be filed prior to the time that a delinquent minor is investigated or detained. An examination of the powers of probation officers reveals no right vested in them to detain, or hold in custody, delinquent minors without the filing of such complaint either by themselves or by a citizen of the county.

Your letter, together with further information you have very kindly furnished us, indicates that not only has there been no arrest or commitment in the situation you refer to, but that there has been no complaint or information filed, according to the statutes, against said delinquent minors. Therefore, we are of the opinion that the sheriff would be entitled to no allowance for the board of said juveniles where they are being held prisoner without statutory authority. This result, of course, follows from the fact that there is no statutory allowance to the sheriff for board where a person is being unlawfully detained. Statutory fees allowed officers are for the performance of official duties. *Smith v. Pettis Co.* 136 S.W. (2d) 282, 345 Mo. 839, 844; *State ex rel. O'Connor v. Riedel* 46 S.W. (2d) 131, 329 Mo. 616, 624.

Your letter mentions the two statutory allowances to the sheriff for boarding prisoners. Since the applicability of the statutes providing these two allowances has been raised by your letter, we shall proceed to a discussion of the two sections which provide for the said allowances.

Section 13413, R.S. Mo., 1939, provides, in part, as follows:

"* * * The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender

is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of each prisoner. * * *

Section 13416, R. S. Mo., 1939, provides as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

These sections have been construed and applied by two Missouri cases. In *State ex rel. Dickmann v. Clark* (1902) 170 Mo. 67, the court applied the provisions of Section 3246, R. S. Mo., 1899. That section was the same as the present section 13413, *supra*, in so far as the provisions pertinent to this discussion are concerned. The prisoner arrested was held pending an examination by a committing magistrate as to whether or not he should be committed to prison to await a trial. The court held that, during this period, the prisoner was in the sheriff's custody by virtue of a *capias* and that, therefore, the sheriff was entitled to the \$1.25 fee provided by the statute, because the situation

fell within the letter of the statute allowing \$1.25 per day to the sheriff for keeping the prisoner "while undergoing an examination preparatory to his commitment". The court quoted with approval Thomas v. County of St. Louis, 61 Mo. 547: (l.c. 76)

"* * * 'It is the duty of a sheriff acting under a capias to arrest and safely keep the person therein named, and to have the body of such person when and where he shall be commanded by such writ; and the statute makes it the duty of all jailers to receive from the sheriff or other officers all persons who shall be apprehended by them for offenses against this State. When a prisoner is arrested under a capias, he is held thereunder until he is either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body of such prisoner, and is not a committing of such person to jail, within the meaning of the statute; and for the safe-keeping of any person in his custody undergoing an examination preparatory to commitment, he is entitled to a per diem allowance, where the number of days such person is so held exceeds one. (Wagn. Stat., 626, Sec. 14.) The words "committing any person to jail," relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions." * * *

The above case dealt with the \$1.25 fee to which the sheriff is entitled under Section 13413, supra, and not to the board allowances of a similar amount, but a reading of the section shows clearly that the \$1.25 board allowances is to be given in connection with the fee provision.

The question of which of the two allowances for Board was to be allowed in a case where a prisoner was arrested after an information had been filed against him and he was being held by the sheriff to await a trial on the merits of the charges, was ruled on in State ex rel. Million v. Allen (1905) 187 Mo. 560. The court in that case set out clearly the situations to which the two statutory allowances applied by stating: (l.c. 564)

"A commitment means a judicial order, and until

such an order is made the person arrested is the sheriff's prisoner by virtue of the capias. (Thomas v. County of St. Louis, 61 Mo. 547.) After an order of commitment has been made by the court, the sheriff or jailor is only entitled to a sum not exceeding fifty cents a day for the board of the prisoner. (Sec. 3246, R.S. 1899.)"

* * * * *

"* * * The statute allows a sheriff one dollar and a quarter a day for having a prisoner in his charge 'while undergoing an examination preparatory to his commitment,' and only allows fifty cents a day for keeping and boarding a prisoner after he is committed to prison or while he is in prison awaiting a trial on the merits of the charge against him.

"The reason for or injustice in the difference is a matter for the legislature solely, and not for the courts. The courts can only enforce the statutory law as it is written."

The allowance of fifty cents referred to in the above case was raised to seventy-five cents by an amendment in 1917, to what is now Section 13416, R.S. Mo., 1939. (Laws of 1917, p. 494)

CONCLUSION.

It is, therefore, the opinion of this department that (1) if no complaint or information has been filed, charging a minor with delinquency, the sheriff of Clay County, Missouri is entitled to no allowances for the boarding of said minor; (2) if a complaint or information has been filed and the minor is being held to await trial on a charge of delinquency, or if a commitment has been issued out of a court of competent jurisdiction, the sheriff would be entitled to an allowance, not to exceed seventy-five cents, set by the county court under the provisions of Section 13416, R.S. Mo., 1939; (3) if a complaint or information has been filed against such child and the child is under investigation pursuant to a determination of whether he should be tried on the charges alleged, the sheriff would be entitled to an allowance of one dollar and a quarter for boarding said child after the first day, pursuant to Section 13413, R.S. Mo., 1939.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

COUNTIES:

: The County Court is required to pay the expenses of the County Farm Organization within the limits of the provisions of Section 5 of House Bill 744, 63rd General Assembly.

June 4, 1946



2
R. Smith
Honorable Ramey Smith
County Clerk
Douglas County
Ava, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date in which you request an opinion of this department regarding the payment, by the County Court, of monthly installments to the County Farm Organization during a period when a vacancy exists in the office of County Extension Agent. Your specific question reads as follows:

"Is Douglas County, required by Law to furnish the Monthly installments during said period even though a County Extension Agent was not at work in the County?"

We think the answer to your question is contained in the provisions of an Act of the 62nd General Assembly found on pages 319 to 322, Laws of Missouri, 1943. Section 6 of that Act reads as follows:

"For the purpose of carrying out the provisions of this act, all funds appropriated by any county court to a county farm organization shall be used to pay the salaries and necessary expenses of men and women, either or both, trained in agriculture and home economics respectively, to serve as county agricultural agents, county home demonstration agents, and county boys' and girls' club agents, and to provide such clerical assistance and office equipment as may be necessary to the effective conduct through these agents, of such educational activities as are specifically authorized by state and federal legislation providing for cooperative extension work in agriculture and home economics as defined by the Smith-Lever act of congress. The office or headquarters of any county agriculture agent, county home demonstration agent or county

boys' and girls' club agent as provided for in this act shall be maintained at the county seat of each county."

Section 7 of the Act reads as follows:

"Following the close of each month, the secretary of the county farm organization shall requisition the county court for the total amount of the month's expenditures, submitting with such requisition a certified itemized statement of all expenditures covered thereby. Such requisition shall constitute the basis for immediate issuance by the county court, of a warrant covering the requisition in full and drawn in favor of the treasurer of the county farm organization. For the purpose of this section the president and secretary of the county farm organization shall be regarded as certifying officers. Provided, that the requisition for any given month shall not exceed one-twelfth of the total amount appropriated for the year, unless a reserve shall have accumulated as a result of expending less than the aforementioned twelfth portion during one or more preceding months, in which case such reserve shall be constantly available for current expenditures. Provided, further than any unused funds remaining in the appropriation on December 31 shall revert to the county treasury."

It will be noticed that Section 6 provides that the County Court shall appropriate money to pay the salaries and necessary expenses of activities necessary to carry out the provisions of that act. This is a clear mandate that the County Court should pay such salaries and expenses as the Farm Organization incurs. It does not restrict the payment to a time when a County Extension Agent is performing his duty.

Your letter indicates that the County Court of Douglas County has been making monthly payments to the County Farm Organization on a pro rata basis.

Section 7, above quoted, provides that the County Court shall issue a warrant covering a requisition drawn by the secretary of the Farm Organization. Said requisition shall contain the total amount of the month's expenditures of the

County Farm Organization. The statute, therefore, does not require that a certain amount be paid each month, but only that the expenses of the Farm Organization for a given month be paid by the County Court. Section 7 further provides that any unused funds remaining in the appropriation on December 31 shall revert to the county treasury. This is a further indication of the fact that the county is required to pay only the expenses of the County Farm Organization and not that they are to give the County Farm Organization a certain stipulated amount each month.

Section 7 also provides that the requisition for any given month shall not exceed one-twelfth of the total amount appropriated for the year, unless a reserve shall have accumulated as a result of expending less than the one-twelfth portion during the preceeding months, and that if a reserve does exist, it shall be available for current expenditures. We think that this provision of the statute was included to meet just such a situation as you mention in your letter. In other words, when the County Farm Organization, by reason of the inability to obtain an adequate staff, does not expend its allotted amount during any one month, it may later use this money for its legitimate expenses. Therefore, the money which was saved by not having to pay the salary of the County Extention Agent can be used to meet current expenses.

The amount to be appropriated by the County Court is governed by Section 5 of the General Act. This section has been amended by House Bill 744, passed by the 63rd General Assembly, and approved by the Governor. This bill, a copy of which we herewith enclose, provides that in counties of the fourth class the minimum appropriation for the County Organization shall be \$1,000.00, and further provides that no county shall appropriate more than 50¢ per capita of the rural population of said county.

We are, therefore, of the opinion that the statutes provide that the County Court should appropriate a certain minimum amount for the purposes of the County Farm Organization, that out of this appropriation the county court is required to pay each month only the expenses of the Farm Organization for that month, and that the Farm Organization may use the money which is left in the appropriation for its future expenses until the appropriation is entirely dissipated.

CONCLUSION

It is, therefore, the opinion of this department that (1)

Hon. Ramey Smith

-4-

the County Court of Douglas County is not required to furnish money in pro rata monthly installments to the County Farm Organization; (2) the County Court of Douglas County is required to pay such expenses of the County Farm Organization as are incurred by the County Farm Organization during the period when a County Extension Agent is not at work in the county so long as these expenses do not exceed, for the entire year, the appropriation made for the County Organization by the County Court, as limited by the terms of the provisions of the 62nd General Assembly, Laws of Missouri, 1943, pages 319 to 322, and House Bill 744 of the 63rd General Assembly, and so long as they remain within the monthly limitations set out in Section 7 of the Act of the 62nd General Assembly.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

Encl.

**STATE PURCHASING
AUTOMOBILES:**

AGENT: RE: The State Purchasing Agent has the discretion of selling goods to the highest and best bidder, if the highest bids are identical he has the discretion of determining which constitutes the best bid.

July 3, 1946



7.5
Mr. William Smith
State Purchasing Agent
Jefferson City, Missouri.

Dear Mr. Smith:

This will acknowledge receipt of your letter of June 24, 1946, in which you request an opinion of this department as follows:

"A number of field employees of the Conservation Commission have been driving state-owned cars. The Conservation Commission has decided that inasmuch as automobiles are scarce that they would prefer that these men drive their own cars on a mileage basis.

"They are stressing upon the idea that this Department should sell the state-owned cars at the top ceiling price as established by the OPA to these employees.

"I would like to have an opinion as to whether or not this is possible under the law inasmuch as the law states that this Department is to receive bids and sell to the highest bidder. Of course, the government laws would prohibit me from selling cars above ceiling price established by the OPA."

Section 69 of S.C.S.S.B. 297, passed by the 63rd General Assembly and approved by the Governor carries this provision relative to the power of the State Purchasing Agent:

"* * *He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof.* *"

Section 65 of the same Bill provides, in part, as follows:

"Section 65. All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchases are to be opened. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also on all purchases estimated to exceed two thousand dollars (\$2,000.00) solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price.* * *"

Your letter refers to the ceiling price on automobiles established by the Office of Price Administration. Recent developments in Washington, D. C. have resulted in the abolition, at least temporarily, of the Office of Price Administration. Due to this fact we will attempt to answer your letter both on the basis of the situation as it exists now and upon the situation which will obtain if the OPA is revived.

The above quoted sections of Senate Bill No. 297 provide that the same rules govern the purchase of goods by the State Purchasing Agent which apply to the sale of goods by him. Therefore, under the terms of Section 65 of Senate Bill No. 297, the Purchasing Agent is required to obtain bids on all supplies sold by him. Where the sale is estimated to be in the amount of two thousand dollars (\$2,000.00) or more, the Purchasing Agent must advertise for bids. Where sales are less than two thousand dollars (\$2,000.00) the Purchasing Agent need not advertise. By the terms of that section the contract of sale must be let to the highest and best bidder and the Purchasing Agent is given the discretionary power to revoke any or all bids. Applying these statutory provisions to the situation when there is no ceiling price on the sale of automobiles, it

follows that the Purchasing Agent should sell to the highest bidder if this bidder is a reliable buyer. In other words, if the buyer is a reliable person the highest bid would be the best bid. Where the bids are for the same amount of money, the Purchasing Agent has the discretion of determining which bid shall be acceptable. Therefore, it is our opinion that the situation regarding the Conservation Commission automobiles should be handled in the same manner as other sales are handled by the State Purchasing Agent, the latter using his discretion as to what is the highest and best bid.

Under an OPA ceiling price, the automobiles could not be sold for a price exceeding that ceiling. Therefore, if the employees of the Conservation Commission offered the ceiling price, it would be the duty of the State Purchasing Agent to determine whether their bids were the best bids and to award the contract of sale to the persons offering the ceiling price whose bids he felt were the best bids. In other words, it would be the duty of the State Purchasing Agent to determine which bid was the best as between those persons offering the ceiling price for the automobiles.

CONCLUSION

It is, therefore, the opinion of this department that if the OPA is not in force at the time the automobiles are sold the State Purchasing Agent should proceed to determine the highest and best bidders and to award the sales to the bidders offering the same, and that if the OPA is in force the State Purchasing Agent should determine which bids are the best bids as between those persons offering the ceiling price for the automobiles.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

STATE PURCHASING AGENT: RE: The money received from the sale of
STATE PENITENTIARY: trucks used by the industries of the
state penitentiary should be deposited
in the state treasury to the credit
of the revolving fund of the penitentiary.

July 12, 1946



Mr. William Smith
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department as to the following:

1. Should the State Purchasing Agent turn over moneys, received from the sale of goods, to the State Treasury for the latter's determination of the proper fund into which the money should be placed?
2. To what fund should the proceeds from the sale of three trucks, used by the industries of the state penitentiary, and which were purchased out of the penitentiary revolving fund, be placed?

Section 15, Article IV of the Constitution provides, in part, as follows:

"Sec. 15. State Treasurer--Duties--Custodian of all State Funds--State Funds Defined--State Depositories--Limitation on Duties.--

"* * * *.Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * * "

Section 34 of Senate Bill No. 237, passed by the 63rd General Assembly and approved by the Governor, which became effective on July 1, 1946, provides, in part, as follows:

"Section 34. All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which such moneys respectively belong, * * *"

We think the above provision of the Constitution and the recent bill setting up the duties of the state treasurer clearly indicate that the state treasurer is to determine the proper fund to the credit of which moneys are to be placed. That part of Section 15, Article IV of the Constitution, quoted above, specifically refers to the duties of the state treasurer and provides that he shall hold money for the benefit of the funds to which it belongs. The Constitution thus implies that he must determine the funds to which moneys belong. There is no constitutional or statutory provision stating that the determination of the proper fund should be made by any other officer, and if the state treasurer is to "hold" money for the proper funds, he would, therefore, be required to determine which was the proper fund.

This is supported by the statutory provision of Senate Bill No. 237, which provides that, on receipt in the state treasury, moneys shall be placed to the benefit of the fund to which they belong. This provision makes it clear that the moneys are to be placed in the respective funds after they are received in the state treasury. At that time they are within the custody of the state treasurer and it follows that he is the proper officer to determine the fund to which moneys belong, since no other officer has any control over them at that time. We think, therefore, that the state treasurer should determine the funds to the credit of which the money should be placed.

There is no statute which specifically indicates where the money, received from the sources indicated in the second question, is to go. We have found no cases, either in Missouri or in other states, which deal with the narrow question presented for our determination. We must, therefore, turn to the statutes and the cases dealing with subjects which are closely akin to the matters which we are herewith concerned.

Since the trucks were purchased with money which constituted a part of the revolving fund of the penitentiary, the statutes dealing with that fund are the most pertinent to the question raised. Since they do not specifically indicate that moneys of this type are to go in the revolving fund, we must look to the purpose of these statutes to determine the second question. In determining the purpose and intention of statutes it is proper that

we consider the titles to the acts in which the statutes were enacted and also the history of the passage of the statutes. Thomas v. Buchanan, 51 S. W.(2d) 95, 330 Mo. 627; Artophone Corp. v. Coale, 133 S. W.(2d) 343, 345 Mo. 344; Coates and Hopkins Realty Co. v. K. C. Terminal R. S. Co., 43 S. W.(2d) 817, 328 Mo. 1118; Cummins v. K. C. Public Service Co., 66 S. W.(2d) 920, 334 Mo. 672; Rust v. Mo. Dental Board, 155 S. W.(2d) 80, 348 Mo. 616.

The revolving fund of the penitentiary was first created in 1903. Section 5 of an act approved March 13, 1903, Laws of Mo. 1903, page 24, read as follows:

"Sec. 5. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of one hundred and twenty-five thousand dollars (\$125,000), which shall be known as the 'Revolving Fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material required in the manufacture of twine and for the purpose of carrying on the business of manufacturing, handling and marketing the said twine until disposed of according to the provisions of this act; and the money in said 'Revolving Fund' shall be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of the said warden."

The purpose of the revolving fund, at its inception, was thus to provide for carrying on the business of the manufacture of twine by the penitentiary. The fund was to be used in connection with that function of the penitentiary.

In 1917 the Legislature provided for the continuance of the revolving fund. Section 128, Laws of Mo. 1917, page 187, read as follows:

"Sec. 128. 'Revolving fund'--how used.-- The account or fund heretofore provided for by law, and known as the 'revolving fund' shall continue to be maintained and known as the 'revolving fund,' which fund, or so much thereof as may be necessary, shall be used only for the purpose of purchasing raw material, machinery or other equipment or in the erection of buildings or making other improvements in plants in connection with the industries carried on or to be carried on in said penitentiary or on the farm or lands mentioned in section 10 hereof or elsewhere; and in the manufacturing, handling and marketing of articles so produced

until disposed of, according to the provision of this act; and the money in said 'revolving fund' shall be paid by the treasurer of the state upon warrants issued by the auditor of the state upon verified vouchers of said board."* * * * *

The title to the bill enacting this section states that one of the subjects of the bill is the "providing for continuing the 'revolving fund' for use of said industries and appropriation for said fund". Considering the purpose of the original act creating the revolving fund and the title to the bill for continuing the fund, it is, we think, clear that the Legislature intended that the revolving fund, as extended in 1917, should be used for the purpose of all the industries of the penitentiary. The 1917 statute is the last legislative expression on the subject, and is the present section 9097, R. S. Mo. 1939.

Section 9097, R. S. Mo. 1939, calls the fund referred to a "revolving fund". It is interesting to note the nature of a revolving fund. In *Kieldsen v. Barrett*, (1931 Idaho) 297 Pac. 405, an enactment of the Idaho Legislature provided that money coming into the possession of the state from the sale or rental of lands granted to the state of Idaho by the United States for the support of the common schools and from the sale or rental of lands acquired by the state under foreclosures of mortgages taken as security for moneys loaned out of the public school endowment fund, were to be placed to the credit of the farm mortgage fund in the amount that the latter fund had been formerly decreased. The farm mortgage fund was referred to by the court as a revolving fund which was for the purpose of paying delinquent taxes and expenses of mortgage foreclosures on land securing farm loans held by the state. To the extent that the farm mortgage fund was drawn on, it was to be reimbursed when collections were made on loans or when the mortgage was foreclosed. The principal of the loan was advanced from the public school endowment fund. The contention of the plaintiff in the case was that all money realized from the foreclosure of the mortgages was to be placed in the public school endowment fund and that the statute placing a part of this money in the farm mortgage fund was unconstitutional. The court held the statute constitutional. The fact that the court called this type of fund a revolving fund shows that money paid out of a revolving fund is expected ultimately to return to that fund. The court summed up this theory in its opinion at l. c. 407:

"The same answer will apply to the state's reimbursing the fund by means of rentals

etc. It has already received from the revolving fund advances equal to all it is required to return, and is just handing back to the true owner that which for a time it has been permitted to use for its own accommodation or profit. * * *

We think the purpose and the nature of the revolving fund which we are here considering would be compromised and violated if the money from the trucks is not returned to the fund from whence it came. This is true because it is not inconceivable that the continued depletion of the revolving fund by the purchase of equipment, such as the three trucks here in question, without returning money realized from the sale of this equipment, might ultimately lead to the fund being extinguished. This result might be reached, even though we assume that the industries will continue to make a profit on the sale of their goods, for the reason that these profits would have to be large enough to allow for the purchase of the entire equipment of the industries out of these profits alone. Otherwise, the amount in the fund would gradually decline. The industries of the penitentiary are an important function of that institution and it is important to the state that the industries continue to function properly. Therefore, we think it would be contrary to the intention of the Legislature, in setting up the revolving fund and providing for the industries of the penitentiary, that there should be an depletion of the revolving fund except that which is absolutely necessary for the functioning of the industries and that, under this theory, the money which is realized from the sale of an article purchased out of the revolving fund should be returned to that fund.

CONCLUSION

It is, therefore, the opinion of this department that, (1) The State Treasurer holds the authority to determine the fund to which moneys placed in the state treasury should be credited. (2) The proceeds from the sale of three trucks, used by the industries of the state penitentiary and which were purchased out of moneys of the revolving fund of the penitentiary, should be placed in the state treasury to the credit of the said revolving fund.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

SNC:mw

ELECTIONS: County committees may fill in candidates for
office of county clerk at August 6, 1946,
NOMINATIONS: primary election.

July 30, 1946



Honorable J. B. Smoot
Prosecuting Attorney
Memphis, Missouri

Dear Sir:

Receipt of your request for an opinion is hereby acknowledged, which reads as follows:

"I would like to have the opinion of your office relative to the authority of the County Committee filling in the ticket for the Office of County Clerk:

"At the date for the filing of Declarations of Candidates, the legislature had failed to enact legislation creating the office of County Clerk and the outlook at the time was that that office would terminate on July 1, 1946. Thereafter and after the last date provided by law for the filing of declarations for office, the legislature enacted a law creating the Office of County Clerk which bill was approved and signed by the Governor.

"The question is, Can the County Committee of either political party fill in a candidate for such office when no person filed a declaration as a candidate for the office?"

We note in Senate Bill No. 483, which is a bill for the creation of the office of clerks of the county court, and which was approved by the Governor on July 12, 1946, with an emergency clause, that Section 25 thereof provides:

"All persons who filed for the office of county clerk in the several counties on or before April

30, 1946, shall have their names printed on the official primary election ballots to be voted at the primary election to be held in August, 1946."

If any such persons have filed for the office of the county clerk on or before April 30, 1946, this section, of course, will apply.

However, if no such persons were filed for that office prior to that date, the situation is comparable to that found in the case of State ex rel. v. Kortjohn, 150 S.W. 1060, 246 Mo. 34. In that case, subsequently to the Republican National Convention in June, 1912, a new political organization came into being, known as the "Progressive Party." Members of the new party sought to have the Board of Election Commissioners of St. Louis place their names on the official ballot. The Board refused to do so. In discussing the nomination made by the Progressive party committee, the Supreme Court of Missouri said:

"* * * In our judgment relators were entitled to a place on the official ballots by reason of this act of the party committee. There may be more obstacles in the way of reaching this conclusion, but in any way of thinking the conclusion is well grounded in legal principles. We have here a political party, nation-wide, organized after the time for taking the preliminary steps for the August primary had expired. Such party, therefore, could not participate in the primary, although it came into existence prior to the primary. The preliminary steps had to be taken prior to June 6, 1912, at which time there was no such political organization, but it did have a national and state organization prior to August 6, the date of the primary. Such party although actually in existence had no candidates for office running at such primary. In the Act of 1909 (Sec. 16, Laws 1909, p. 485), it is provided; 'Vacancies occurring after the holding of any primary

or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or State, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid.

"This section is broad enough to permit the party committee of such party to fill any and all vacancies upon their party ticket.
* * *"

The difference between the Kortjohn case, supra, and your situation is that, in the Kortjohn case, there were no candidates filed prior to the primary election by a new party, and in your letter, there was no office in existence for which nominations could be filed. However, the office is now, prior to the primary election, in existence. Senate Bill No. 483, a bill for the creation of the office of clerks of the county courts, was approved by the Governor on July 12, 1946, with an emergency clause.

CONCLUSION

It is, therefore, the opinion of this department that the county committees of the political parties may fill in a candidate for the office of county clerk, since, at the last date for filing a candidate's nomination, that office was nonexistent and subsequently has come into being prior to the primary election of August 6, 1946.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:LR

PURCHASING AGENT: State departments may purchase personal property, through Purchasing Agent, by trading in property to be replaced and paying balance in cash.

Filed: No. 83

September 30, 1946



Honorable William L. Smith
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

At your request and at the request of other state officials, we are reviewing the opinion of this department rendered to Honorable George Blowers, State Purchasing Agent, on June 30, 1938, which holds that the State Purchasing Agent may not exchange or trade wheat owned by the state for flour. On authority of that opinion, this department in a letter to Honorable Ira A. Jones, President of the Board of Managers, State Eleemosynary Institutions, on April 21, 1942, answered the following question in the negative:

"Is it possible for us to trade through the Purchasing Agent automobiles, paying a cash difference or receiving a cash difference in the trade?"

The 63rd General Assembly by Senate Committee Substitute for Senate Bill No. 297 repealed and re-enacted in substantially the same form the Purchasing Agent Act (chapter 105, R. S. Mo. 1939). Section 64 of S.C.S.S.B. No. 297 provides in part as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided.
* * *" (Underscoring ours.)

Section 69 of the same bill provides:

" * * * He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof. * * *" (Underscoring ours.)

Section 65 deals with how purchases shall be made and provides that they shall be based on competitive bids and the contract shall be let to the lowest and best bidder. The statute further provides that the "purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the Governor, purchase the required supplies on the open market if they can be so purchased at a better price."

The question as to whether the various state departments through the State Purchasing Agent "may trade" or "exchange" state property, rests upon the construction of the words "purchase" and "sell" as used in Sections 64 and 69, supra.

It is the fundamental rule of statutory construction that the court shall, by all aids available, ascertain and give effect to the intention of the Legislature; *State v. Toombs*, 25 S. W. (2d) 101; *Thompson v. Lemarr*, 17 S. W. (2d) 960, 322 Mo. 514.

One method of determining the intention of the Legislature in enacting a particular statute is to look to the object to be accomplished; *Boll v. Condie-Bray Glass Company*, 11 S. W. (2d) 48, 321 Mo. 92. As was said in 59 *Corpus Juris* 961, "In construing a statute to give effect to the intent or purpose of the Legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose."

It is common knowledge that prior to the enactment of the "State Purchasing Agent Act" in 1933 (*Laws of Missouri 1933*, page 410) that each state department made arrangements for and purchased its own supplies. The only limitation imposed upon such purchases was that there be a sufficient appropriation to cover such purchases and that there be an unexpended balance in the state treasury to pay for the same (Sections 11404 and 11425, *R. S. Mo. 1929*).

In creating the State Purchasing Department and providing that the State Purchasing Agent shall purchase supplies for all departments, the obvious intent of the Legislature was to eliminate excessive purchases by the various departments at uncontrolled prices and to inaugurate a program of economy and system in the purchase of state supplies. Wide discretion was given to the State Purchasing Agent in the acceptance or rejection of bids so that he could effectuate this policy of securing for the state departments, supplies in the best and most economical fashion.

With this thought in mind we turn to the construction of the word "purchase" and "sell."

59 Corpus Juris 1105, states that, "Laws enacted in the interest of public welfare * * * should be liberally construed with a view to promote the object in the mind of the Legislature," and the same work points out that even when the rule of strict construction is to be followed, such rule is not violated "by permitting the words to have their full meaning or the more extended of two meanings."

The word "purchase" as used here (as distinguished from "purchase or descent" as used in real estate and probate law) has not been defined by the courts of this state. However, in Words & Phrases, Vol. 35, p. 477, the following definitions are given:

"The word 'purchase,' in its popular sense, has the narrower signification of acquisition by voluntary act or agreement for a valuable consideration. City of Enterprise v. Smith, 62 P. 324, 325, 62 Kan. 815.

"'Purchase,' in a popular and confined sense, means acquisition by way of bargain and sale or other valuable consideration, or the transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration. Cobb v. Webb, 64 S. W. 792, 793, 26 Tex. Civ. App. 467."

The above definitions require only that the acquisition of the property be for a valuable consideration and do not limit such acquisition to the payment of money.

In State v. Miller, 300 S. W. 765, our Supreme Court had occasion to discuss the question of whether the word "sell" included the words "barter and trade." The court said:

"The word 'sell,' as defined by Webster's Dictionary, means:

"'To transfer property for a consideration; to transfer the absolute or general title to another for a price or a sum of money; * * * to dispose of in return for something.'"

"And the word 'sale' in the same dictionary is defined as a contract whereby the absolute or general ownership of property is transferred from one person to another for a price or sum of money; or, loosely, for any consideration.

"These are legal definitions, and mentioned in the encyclopaedias. In the restricted sense, then, 'sell' may be distinguished from 'trade,' but in the broader sense it includes trade or barter. * * *

It will be seen therefore that the above definitions of "purchase" and "sell" are broad enough to include the words "trade or exchange." In giving such construction to the words mentioned, the object of the Legislature in passing the statute is effectuated. It is common knowledge that in the purchase of supplies, money may be saved by trading in the used property rather than selling it and buying new supplies at the full purchase price. The "trading in" makes for economy in state government, which is the purpose of the "Purchasing Agent Act."

This interpretation is bolstered by the construction placed upon such statutes by the Legislature itself. The interpretation of a law by the General Assembly, though not controlling, is entitled to respectful consideration (State ex rel. Wayland v. Herring, 208 Mo. 708, 106 S.W. 984, 59 C.J. 1033). In 1933 the same Legislature that enacted the "Purchasing Agent Act" provided in the various appropriation bills that no passenger cars for the various departments could be purchased at a cost "including any automobile traded in" to exceed eight hundred dollars (\$800.00) each (Laws of Missouri, 1933, pages 89, 101, 112, 118, 131, 136, 139, 161). Thus the same Legislature construed the word "purchase" as including "trade in." Subsequent Legislatures in 1935, 1939, 1941 and 1943 included the "trade in provision" in the appropriation acts of those years.

Further, it will be noted that section 66 of S.C.S.S.B. No. 297, which is a new section added by the 1945 act, provides that in the purchase of surplus war materials the State Purchasing Agent may "purchase * * for cash, credit, or other property" (underscoring ours). This is, still further, an example of Legislative construction.

The only case that we have been able to find which specifically deals with the question at hand is that of Bartlett v. City of Lowell, 201 Mass. 151, 87 N. E. 195. In that case there was involved a statute which provided that the city of Lowell was to have a department of supplies with a chief

elected annually by the voters. The statute further provided that, "all materials and supplies for the city shall be purchased by the chief or head of such department subject to the approval of the mayor."

The plaintiff in the case contracted with the Superintendent of Streets whereby the gravel on the plaintiff's property was to be used by the city upon its streets and was to be paid for by other filling owned by the city which filling was to be deposited on the lot from which the gravel was taken. The plaintiff alleged that this material had not been "purchased" by the city so as to bring it within purview of the statute requiring all material to be purchased by the Department of Supplies. The Court said:

"* * * It is plain that the change made by the new charter in regard to the purchase of material and supplies was revolutionary, and that these provisions of the charter should receive a broad construction. For that reason we cannot adopt the construction contended for by the learned counsel for the plaintiff, to wit, that the word 'purchase' should be limited to a purchase for money, excluding a purchase where the property bought is to be paid for in kind and that the word 'supplies' should be limited to articles of food, and the word 'material' to 'that which the city has occasion to have on hand for the manufacture of other things.' On the contrary we are of opinion that a purchase of gravel to be taken away by the city and used in repairing the city streets, to be paid for by other filling deposited on the lot in question by the city, is a purchase of material within St. 1896, p. 365, c. 415, Sec. 3."

We believe the law as laid down by the Supreme Judicial Court of Massachusetts construing a statute practically identical with Section 64, supra, is applicable to the question presented in the instant case and that the opinion rendered by this department on June 30, 1938, to Honorable George Blowers, State Purchasing Agent, should be overruled.

Hon. William L. Smith

(6)

CONCLUSION

It is, therefore, the opinion of this office that the various state departments and agencies, when purchasing personal property through the State Purchasing Agent to replace property of the department, may trade in the property to be replaced as part of the purchase price and pay the balance, if any, out of the proper appropriation.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

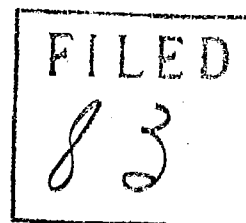
APPROVED:

J. E. TAYLOR
Attorney General

APPROPRIATIONS: An appropriation act which does not distinctly specify the amount and purpose of the appropriation without reference to any other law is unconstitutional.

CONSTITUTIONAL LAW:

November 13, 1946



11/25

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. E. Ragland
Chief Clerk

Dear Sir:

This acknowledges your request, which is as follows:

"Section 1, of House Bill 1035, provides for transfer of two million dollars from the Missouri Postwar Fund to County Aid Road Fund to be apportioned to the several counties of the state for certain purposes.

"I would like to have your official opinion, if the phrasing in this section is such that it appropriates the money from the County Road Aid Fund."

Replying thereto, the House Committee Substitute for House Bill No. 1035, which is the appropriation act in question, provides as follows:

"There is hereby appropriated out of the State Treasury chargeable to the Missouri postwar reserve fund the sum of Two Million (\$2,000,000.00) Dollars, and the said sum of Two Million (\$2,000,000.00) Dollars is hereby transferred and set apart to the county aid road fund to be apportioned to the several counties of the state for the purpose of aiding and assisting counties in the improvement, construction, reconstruction and restoration of county roads as provided in Committee Substitute for

House Bill No. 214, an Act of the 63rd General Assembly, approved July 23, 1946; for the period beginning July 1, 1946 and ending June 30, 1947."

There are several sections of the 1945 Constitution bearing on this question. Section 36 of Article III provides, among other things:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law."

Section 15 of Article IV of the 1945 Constitution requires the state treasurer to hold such money for the benefit of the respective funds to which they belong and disburse them as provided by law.

Section 23 of Article IV of the 1945 Constitution provides:

" * * * * Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Section 23 of Article IV, supra, does not appear to have been followed in the drafting of said appropriation act, being House Committee Substitute for House Bill No. 1035.

It will be observed that this appropriation act appropriates two million dollars out of the state treasury "chargeable to the Missouri postwar reserve fund." Then it seeks to direct that said two million dollars be "transferred and set apart to the county aid road fund to be apportioned to the several counties of the state for the purpose of aiding and assisting counties in the improvement, construction, reconstruction and restoration of county roads as provided in Committee Substitute for House Bill No. 214, * * * *." If that part of said Section I, as follows, to wit, "as provided in Committee Substitute for House Bill No. 214, an Act of the 63rd General Assembly, approved July 23, 1946," were left out of said appropriation act, then the appropriation act, absent other defects, would be to appropriate this two million dollars "for the purpose of aiding and assisting counties in the improvement, construction, reconstruction and restoration of county roads," which would leave

the field wide open for expending said money on any county roads, and that was not the intent of the Legislature in passing said appropriation act. It was evidently the intent of the Legislature that said money should only be used in the improvement, construction, reconstruction and restoration of county roads that fall within the classes provided for in Section 3 of Committee Substitute for House Bill No. 214, which are subdivided into five classes as follows:

"FIRST: County roads which are used for all of the following purposes: School bus routes, mail routes, milk routes.

"SECOND: County roads which are used for any two of the following purposes: School bus routes, mail routes, milk routes.

"THIRD: County roads which are now used for any one of the following purposes: School bus routes, mail routes, milk routes.

"FOURTH: County roads which may be used, if improved or restored, for any one or more of the following purposes: School bus routes, mail routes, milk routes.

"FIFTH: Any other county road, provided consideration shall be given to the number of farms served by said road and the amount of traffic on said road."

It further appears that it was evidently the intent of the lawmaking body that no part of said two million dollars should be expended on any of said five classes unless the County Court gave consideration, "FIRST, to all-weather county roads which have deteriorated and are in need of restoration or reconstruction, SECOND, to dirt or non-all-weather county roads, and, THIRD, to any other county roads."

It further appears to be the intent of the Legislature that said funds be restricted so that not more than seven hundred and fifty dollars per mile or fifty per cent of the total cost of the county projects, whichever is less, shall be expended out of said funds so appropriated and that the various other provisions of Committee Substitute for House Bill No. 214 should be complied with as conditions precedent to the actual payment of the funds so appropriated.

Honorable Forrest Smith

-4-

It will be seen that it becomes necessary to refer to Committee Substitute for House Bill No. 214 in order to determine the meaning of House Committee Substitute for House Bill No. 1035, and that is prohibited by Section 23 of Article IV of the new Constitution which says that every appropriation law shall distinctly specify the amount and purpose of the appropriation "without reference to any other law to fix the amount or purpose."

Conclusion.

It is our opinion that Committee Substitute for House Bill No. 1035 is unconstitutional and void.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

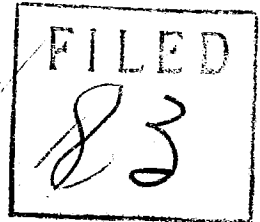
APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

SCHOOLS: Traveling expenses of county superintendents of 3rd and 4th class counties should be figured against total compensation of said officers.

November 25, 1946



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date, which reads as follows:

"House Bills 770 and 771, fixes the salary and the traveling expenses of the county superintendent of schools in counties of the 3rd and 4th class.

In determining the amount of traveling expenses, we would like to have an opinion from your office as to whether both the salary, as fixed in section 1, and the compensation as fixed in section 3 of these two bills, should be added in determining the travel expenses of the county superintendent of schools, or whether only the amounts specified in section 1 of these bills are to be used.

We have received a number of requests from various county school superintendents asking that we secure an opinion from your office on this question."

The provisions of H. B. 770 and H. B. 771 of the 1945 legislature are identical in so far as they relate to the traveling expenses of county superintendents. The portions of said sections dealing with such expenses are found in section 2 of each act and read as follows:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. * * * * The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. * * * * Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled."

It will be observed that by the foregoing provisions, the county superintendents are required to present bills to the county court setting forth their actual and necessary expenditures for traveling expenses, and the county courts are required to pay such bills, subject of course, to the limitation in the first sentence of said sections 2, that the total traveling expenses for any one year shall not exceed twenty-five per cent of the annual salary of such superintendents. It, therefore, becomes necessary to determine what the annual salaries of the county superintendents are.

Sections 1 of said acts, insofar as they relate to the compensation of county superintendents, are identical, except that H. B. 770 contains extra brackets for compensation in counties of various population. The construction of one of said sections would, therefore, be the same as that of the other. H. B. 771 reads as follows:

"In counties of the fourth class in this state, having less than 7,000 population, the county superintendent of schools shall receive \$1050.00 per annum; in those having a population of 7,000 and less than 10,000, he shall receive \$1200.00 per annum; in those having a population of 10,000 and less than 12,000, he shall receive \$1350.00 per annum; in those having a population of 12,000 and less than

15,000, he shall receive \$1600.00 per annum; in those having a population of 15,000 or more, he shall receive \$1800.00 per annum. The State of Missouri shall appropriate annually, out of the general revenue fund of the State of Missouri, \$400.00 to each and every county of the fourth class. The county superintendent of schools shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasury."

It should be noted that in setting the amounts, the county superintendent shall receive, said amounts are not designated either as salary or compensation. The act merely says the county superintendent of schools shall receive a stipulated amount per annum. The last sentence of Section 1 refers to the amount so received as "his salary". Section 3 of said acts provide compensation for county superintendents for their services as supervisors of school transportation. Again the sections of both acts are identical except that H. B. 770 contains more brackets for compensation according to various populations than does H. B. 771, and, therefore, the construction put upon section 3 of either act must necessarily be the same as that put upon the same section of the other act. Section 3 of H. B. 771 reads as follows:

"County superintendents of schools in counties of the fourth class in this state shall be compensated for their duties as supervisors of school transportation, in addition to the salary provided in Section 1 of this act, as follows: In counties having less than 7,000 population, he shall receive \$375.00 per annum; in those having 7,000 and less than 10,000 population, he shall receive \$435.00 per annum; in those having 10,000 and less than 12,000 population, he shall receive \$495.00 per annum; in those having 12,000 and less than 15,000 population, he shall receive \$555.00 per annum; and in those having 15,000 or more population, he shall receive \$615.00 per annum. The county treasurers of the several counties shall pay over such compensation monthly out of funds received

by said county treasurers from the State of Missouri for the purpose of compensating county superintendents of schools for their duties as supervisors of school transportation, at the same time he pays the county superintendent of schools his salary for the performance of his other duties."

It will be observed that the foregoing section provides that the county superintendent "shall be compensated" for his duties as supervisor of school transportation a specified amount per annum in addition to the "salary" provided in Section 1. Here again the act refers to the compensation provided by section 1 as "salary", and in the last sentence of said section, the compensation provided by section 1 is again referred to as "his salary for the performance of his other duties."

We see, therefore, that county superintendents affected by said acts receive compensation for their duties as supervisors of school transportation and also for the performance of their "other duties." The compensation for performance of their "other duties" is referred to as salary, and the compensation for duties as supervisors of school transportation is merely referred to as "compensation". The question to be determined is whether the compensation for duties as supervisors of transportation is a part of the "annual salary" of such superintendents referred to in sections 2 of said acts.

Salary is defined as follows:

"Recompense, usually periodically, for services rendered." Webster's New Standard Dictionary

"A stipulated recompense for services rendered, usually fixed for one year and paid pro rata, at varying periods, as weekly, monthly, etc.; hire; wages." Webster's Twentieth Century Dictionary

From the foregoing definitions it appears that a salary is merely a stipulated compensation payable periodically. Annual salary would be one fixed by the year, although payable at different periods during the year. A monthly salary would be one fixed by the month. When, therefore, H. B. 770 and H. B. 771 provide a compensation per year they in effect provide an annual salary whether they denominate the compensation "salary" or merely "compensation". By said acts the compensation for county superintendents for their duties as supervisors of transportation is fixed at a stipulated sum per year, and it is provided that said sum shall be paid to said officers monthly. Said compensation is, therefore, an annual salary, payable monthly.

We think the following cases support the above conclusion:

In Kellogg v. Story County et al, 257 NW 778 (Iowa), the court was considering a statute regarding the salary of a county superintendent of schools. In the opinion the court said:

"It is provided by section 5232 of the code that each county superintendent of schools shall receive an annual salary of not less than \$1,800 per year and such additional compensation as may be allowed by the board of supervisors in each particular county.

The question is strictly one of statutory construction. It is true that both the words "salary" and "compensation" are used in section 5232. They are, it seems to the court, used without differentiation. The compensation to be awarded to the county superintendent is in the nature of salary, and any amount added by the board to the minimum provided by the statute must be treated as a part of such salary."

In *Spokely v. Haaven*, 237 NW 11 (Minn.), the Court was considering a statute which limited campaign disbursements for county offices to a sum of not exceeding one-third of the salary to which such person would, if elected, be entitled during the first year of his incumbency in such office. Said statute further provided that if such person would not receive a salary, then the limit would be one-third of the compensation which his predecessor received during the first year of such predecessor's incumbency. The county officer involved in that case was a sheriff whose compensation was a salary plus certain fees, and the question was whether in determining the limit of campaign expenditures for that office both the salary and fees should be added together. The court, after quoting various definitions of "salary" and "compensation" said:

"We are of the opinion that the legislature intended to base its restriction on such disbursements, at least in a measure, in proportion to the gross official income. It seems apparent that it was the intention of the legislature to limit the authorized campaign expenses to one-third of the official income for the first year in office. Compensation was the controlling element. From a practical viewpoint and for the purpose of the particular law there could be no reason for making a distinction between 'salary' and 'fees', and we hold that the word 'salary' used in this legislative enactment was used in its flexible broad sense of compensation including both 'salary' and 'fees'."

In *United Boxboard and Paper Co. v. McEvan Bros. Co.* 76 A. 550, 554 (N.J.) the Court said:

"I see no difference between salary paid for services and compensation rendered or allowed for services. Salary in its general sense is a compensation for services rendered by one to another, but because it may be stipulated for beforehand the word gives to the thing no dignity, force, or operation which is not included in the word 'compensation'."

When, therefore, the legislature by sections 2 of the acts under discussion used the words "annual salary", we think it meant the total annual compensation. This would include both the salary as supervisor of transportation and the salary for other duties. The provisions as to expenses were evidently designed to reimburse the county superintendents for money expended by them in traveling while performing their duties. There would be no reason to assume that the legislature intended that the county superintendents should bear their own expenses while traveling in connection with their duties as supervisors of school transportation, but should be reimbursed for their expenses while traveling in the performance of their other duties. We believe the provisions of Sections 2 regarding the traveling expenses were designed to guarantee that the county superintendents should receive their compensation for their own use and that they should not be required to use any part of same for traveling expenses.

Conclusion

It is, therefore, the opinion of this office that the annual salary of the county superintendent of a county of the third class is the total sum of the salary provided by Section 1 of H. B. 770 and the compensation for acting as supervisor of school transportation provided by Section 3 of said act and that the annual salary of the county superintendent of a county of the fourth class is the total sum of the salary provided by Section 1 of H. B. 771 and the compensation for acting as supervisor of school transportation provided by Section 3 of said act; and that said superintendents are entitled to be reimbursed for amounts actually and necessarily expended for their traveling expenses in performing the duties of their office, not to exceed, however, twenty-five per cent of said annual salaries.

Yours very truly,

Harry H. Kay
Assistant Attorney General

APPROVED:

J. E. Taylor, Attorney General

HHK/vlv

CIRCUIT COURTS: Final disposition of change of venue
SALARIES AND FEES: fee under Section 1074, R.S. Mo. 1939.

FILED

83

December 5, 1946

12/19

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request under date of December 3, 1946, which reads:

"To request your official opinion as to what disposition should be made of the ten dollars received by a circuit clerk in cases of change as provided by Section 1074 R.S. Mo., 1939, since Senate Committee Substitute Senate Bill No. 442 enacted by the 63rd General Assembly became effective."

This department recently ruled that under Senate Committee Substitute for Senate Bill No. 442 circuit judges are no longer entitled to receive the \$10.00 change of venue fee provided for in Section 1074, R.S. Mo. 1939. However, said bill did not repeal that part of Section 1074, supra, which requires litigants filing applications for change of venue to also file the \$10.00 fee with the clerk of the circuit court.

Section 24, Article V, Constitution of Missouri of 1945, requires fees of judges to be paid monthly into either the state treasury or the county that pays the salaries. Said provision reads in part;

"* * * The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

The foregoing constitutional provision is unquestionably self-executing, and, therefore, needs no legislation to carry it into effect. It is well established that constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect. In State ex rel. City

of *Fulton v. Smith*, 194 S.W. (2d) 302, l.c. 304, the court said:

"We are of the opinion that the mooted constitutional provision, the text of which is set forth in the margin, is not subject to the foregoing construction. 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * *

Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' 11 Am. Jur., Constitutional Law, Section 74, pp. 691, 692. See, also, 16 C.J.S., Constitutional Law, Section 48, pp. 98-101. * * * * *

The salaries of circuit judges under S.C.S.S.B. No. 442 vary according to the number of counties in the judicial circuit and population. In some instances the salary is required to be paid solely out of the state treasury, and in other instances part of the salary is required to be paid out of the state treasury and balance out of the county or city composing said circuit. Sections 2 and 3 of S.C.S.S.B. No. 442 read:

"From and after the effective date of this Act, each judge of the circuit court of a judicial circuit composed of a single county or city which now has or may hereafter have more than 200,000 inhabitants, shall receive an annual salary of \$9,000.00, \$6,000.00 of which shall be paid by the state out of the

state treasury and \$3,000.00 by the county or city composing said circuit; each judge of the circuit court of a judicial circuit composed of a single county which now has or may hereafter have more than 85,000 inhabitants and less than 200,000 inhabitants, shall receive an annual salary of \$7,200.00, \$6,000.00 of which shall be paid by the state out of the state treasury and \$1,200.00 by the county composing said circuit; and all other judges of the circuit courts of this State shall each receive an annual salary of \$6,000.00 payable by the State out of the State treasury.

"From and after the effective date of this Act, the judge of the Cape Girardeau Court of Common Pleas shall receive an annual salary of \$5,000.00, said salary to be paid in equal monthly installments on the first day of each month, out of the State treasury."

We think there can be no question but that the \$10.00 change of venue fee provided for under Section 1074, R.S. Mo. 1939, is either a fee of the court or circuit judge. At least the Constitutional Convention was of this opinion as can be seen from the constitutional debates. Judge Williams, a member of the Constitutional Convention from Springfield, Missouri, offered an amendment to exempt change of venue fees by inserting the words "except change of venue fees of circuit judges" after the word "magistrates" in Section 24, Article V, Constitution, 1945. The discussion on this additional amendment of Judge Williams, which was defeated, commences on Page 2755 of the transcript of the debates of the Constitutional Convention and continues through Page 2760, and reads in part as follows:

"At page 2757, Mr. Righter, in opposing the amendment of Judge Williams, stated:

"This, Mr. President, this amendment of Judge Williams is a small thing in itself, and yet the members will see, from having read Section 24, that we are endeavoring, and the substitute is the same as the original section adopted by the Committee in this regard, that we are attempting to do away with the fee system in the courts and have a judge paid an adequate salary

for his services as judge and nothing but his services as a judge, and make that sufficient to properly sustain the office.'

"Mr. Righter, after pointing out abuses of the fee system in the probate courts and the justice of the peace courts, urged that no exception be made for these change of venue fees, stating:

"* * Well, the Legislature compensates him and under this section, will compensate him for being a full time circuit judge, devote his time to the trial of such cases as according to the due processes of the law come before him. Now, why should he in the entire system of courts, be the single exception and just because he gets a few more cases a year from other circuits, why should he have this additional thing in the nature of a fee? Let him be adequately compensated for trying all the cases that will come before him, and then let's stop there and have a cleancut system.
* *'

"At page 2758, Mr. Brown of Christian County, read the sentence requiring the fees of all the courts, judges and magistrates, to be paid into the state or county treasury. And there followed these questions and answers:

"Mr. Brown (of Christian): 'Now, that means that the judge would have to send his \$10.00 change of venue fee to the state treasury instead of getting it for the extra work he has to do in trying to get this law suit that is sent to him, isn't it?'

"Mr. Righter: 'Yes, that is right.'"

There will be no difficulty encountered in so distributing said change of venue fees other than those in the City of St. Louis, Missouri. Section 1074, P.S. No. 1939, requires that said change of venue fees, when deposited with a circuit clerk of the City of St. Louis to be paid into the city treasury, are to be used for the payment of salaries of circuit judges and court stenographers of said city. In such case, the change of

venue fees apparently are not considered additional compensation for the circuit judge hearing the cause as in other cases, but goes toward the payment of salaries for all circuit judges in the City of St. Louis, as well as court stenographers in said city. Notwithstanding this fact, we consider that part of Section 1074, supra, to be in conflict with Section 24, Article V, Constitution, 1945, supra, requiring fees of all courts, judges, etc., to be paid monthly into the state treasury or county paying their salaries. Section 31, Article VI, Constitution, 1945, reads in part:

"The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. * * *"

Therefore, in this instance under Section 24, Article V, supra, the City of St. Louis can be considered as a county.

Where there is a conflict between an act and the Constitution the court must declare said act, in so far as it conflicts with the Constitution, void. See *Gilkeson v. Missouri Pac. R. Co.*, 121 S.W. 138, 222 Mo. 173. Also *State ex rel. Elsas v. Missouri Workmen's Compensation Commission*, 2 S.W. (2d) 796, 318 Mo. 1004. In view of the foregoing, we believe the change of venue fees paid to the circuit clerk of the City of St. Louis should be paid by said clerk into the state treasury or city in proportion to the amount of salary paid by the state or the city as provided in S.C.S.S.B. No. 442.

CONCLUSION

Therefore, it is the opinion of this department that the change of venue fee required to be filed with the circuit clerk upon the filing of an application for a change of venue under Section 1074, R.S. Mo. 1939, should be paid by the circuit clerk of the county or City of St. Louis wherein the cause is sent on change of venue, into the state treasury, county or City of St. Louis in proportion to the amount of salary paid the circuit judge out of the state treasury, county or City of St. Louis as the case may be.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

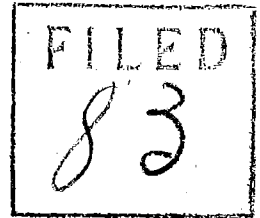
J. E. TAYLOR
Attorney General

ARM:LR

COUNTY COURTS:
COUNTY HOSPITALS:

The location of the city, town or village in which a county hospital is established under the provisions of Art. 4, Chap. 126, R.S. Mo. 1939, is designated by the county court. The exact site of such hospital is designated by board of trustees.

December 9, 1946



recd
17/9

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department, and reading as follows:

"Under Sec. 15192, R. S. Mo. 1939 is it necessary in the petition of the freeholders and in the notice that the exact legal description of the proposed site be given, or is it sufficient that the general location, such as the city, town or village or the township, be named?"

Section 15192, Article 4, Chapter 126, R. S. Mo. 1939, has been repealed by House Bill No. 756, passed by the 63rd General Assembly, which bill is found in the June Pamphlet of the Revised Statutes Annotated, and which became effective July 1, 1946.

Under the provisions of House Bill No. 756, the petition by the freeholders specifying the "place" in the county where the hospital is to be located is no longer required. The establishment, construction, equipment, improvement, repairing and maintenance of such a hospital is now in the hands of the county court, and such action in establishing and maintaining such hospital is taken by the court in appointing the trustees, who then buy a site and construct a hospital building, or buy a hospital building, and equip the same, appoint a superintendent, and maintain the hospital generally. The vote of the people is no longer necessary for the establishment of such hospital, but such establishment is a function of the county court. The people vote only on a bond issue for

construction of a county hospital, and they vote for this bond issue only if such action is necessary for the raising of money for such a hospital, since it is provided that the county court may issue bonds, and such issuance of bonds is made only under the provisions of House Bill No. 749, passed by the 63rd General Assembly, on petition of one per cent or three hundred voters of the county, whichever is greater. If donations are received by a county, under Section 15204, R. S. Mo. 1939, which are sufficient to construct and maintain such a hospital, obviously no bond issue is necessary.

The power to appoint the five trustees provided for in Article 4, Chapter 126, R. S. Mo. 1939, is fixed in the county court. It is provided in Section 15193 of House Bill No. 756:

"The county court shall appoint five (5) trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three (3) of said trustees to be residents of the city, town or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital. * * *"
(Emphasis ours.)

Clearly, under the above provision, the county court must designate the city, town or village where the hospital is to be located. There is no provision in this article regarding the time when the city, town or village is to be designated by the county court, except that such designation must be made before the trustees are appointed, since it is provided that two of the trustees must be from some place other than the city, town or village in which the hospital is to be located.

It is provided in Section 15200, R. S. Mo. 1939:

"The jurisdiction of the city, town or village in or near which such public hospital is located shall extend over all lands used for hospital purposes outside the corporate limits if so located, * * *"
(Emphasis ours.)

Section 15193 of House Bill No. 756 is specific in requiring that the hospital shall be located in a city, town or

village. The location is fixed by the county court, and the location must be fixed in such city, town or village as such city, town or village exists when the selection is made by the county court. We see no authority in any statute for the designation of a location outside of a city, town or village. The provision in Section 15200, R. S. Mo. 1939, that the city, town or village "near which such public hospital is located" should have jurisdiction over all lands used for hospital purposes, is no authority whatsoever for the designation by the county court of a location outside a city, town or village.

It is clear that Article 4, Chapter 126, R. S. Mo. 1939, provides that the county court shall designate the city, town or village in which the hospital is to be located, and that the board of trustees shall select the specific site of the hospital in such city, town or village.

CONCLUSION

It is the conclusion of this department that the vote of the people is not necessary for the establishment of a county hospital under the provisions of Article 4, Chapter 126, R. S. Mo. 1939, but such vote is necessary only for the voting of bonds for such hospital if it is necessary to raise the money by bond issue. The county court designates the city, town or village in which the county hospital is to be located, and such designation must be made before the trustees are appointed. The board of trustees selects the specific site of the hospital in the city, town or village designated by the county court.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CORONER'S INQUEST: County to pay cost thereof.

FILED

83

December 23, 1946

17/31

Mr. J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This will acknowledge your request for an opinion, based on the following facts:

"This inquest was held over Tom Cantrell, and Charles Bruce was charged killing him, Bruce was tried for murder in the first degree, and verdict 'Not Guilty.'

"The Circuit Clerk thinks the state should pay the cost of the inquest, and ask me to write your office for an opinion as to who pays the cost of the inquest.

"As per his request I kindly ask you to let me know who is to pay the cost so I can tell him what you say in the matter."

Your attention is called to the following sections of the Missouri Revised Statutes Annotated, 1939:

Section 13231.

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his

warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 13251.

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables, and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

The Supreme Court of Missouri, in the case of State v. Bartley, 34 Mo. (2d) 637, 1.c. 639, 357 Mo. 229, held that a coroner's inquest is not a part of a criminal prosecution. It follows; therefore, that the costs and expenses of holding an inquest would not be a part of the costs paid by the state in a criminal case.

In construing these statutes the Court said in the case of Houts v. McCluney, 102 Mo. 13, 1.c. 16:

"Now a little attention to these statutes will relieve this case of all difficulty. In the first place, no costs are allowed by the common law. They are, with us, creatures of the statute. They must be paid in the amounts and in the manner"

specified in the statute. Sections 5156 and 5613 are clear and unambiguous. They make the county liable for the fees allowed the coroner, jurors, witnesses and the constable in all inquests where the coroner has reasonable cause to believe that the person, over whose body the inquest is held, came to his death by violence or casualty.
* * * *

Conclusion.

It is, therefore, the opinion of this department that the expenses of holding the inquest mentioned in your request must be paid by the county.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. W. TAYLOR
Attorney General

WED:ml

COUNTY CLERKS / Will not vacate their office until the first
Monday in January, 1947.



December 30, 1946

12/31

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. E. Ragland,
Chief Clerk

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, reading as follows:

"Section 2, Senate Bill No. 483, enacted by the 63rd General Assembly, provides for the election of clerk of the county court, and 'that said clerk shall enter upon the duties of his office the first day of January next after his election.' This section also provides 'that the term of office of persons holding the office of the clerk of the county court at the time this act shall take effect shall not be vacated or affected thereby.'"

"We request your official opinion as to when the present county clerk will vacate his office."

Senate Bill 483 of the 63rd General Assembly, effective July 12, 1946, which establishes the office of clerk of the county court, provides in Section 2 as follows:

"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state

shall elect a clerk of the county court, who shall be commissioned by the governor and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election: Provided, that the term of office of persons holding the office of clerk of the county court at the time this act shall take effect shall not be vacated or affected thereby."

It will be noted that although this section provides that the clerk of the county court shall take office the first day of January, this provision is limited by a proviso. In construing the effect of provisos the Supreme Court in State ex rel. Crow v. City of St. Louis, 174 Mo. 125, stated at l. c. 145-146:

"* * * 'A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing specially for them. *
* * * * *
The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears; and should be construed with the section with which it is connected. * * * *"

And further, in Brown v. Patterson, 224 Mo. 639, the court stated at l. c. 658:

"* * * The purpose of a proviso is not to create new rights or make new law or to take away old rights existing under the law or to repeal a part of existing substantive law, but to restrict or restrain the preceding portion of the statute of which it forms a part. * * *"

Applying these rules of statutory construction, we are of the belief that the clerks of the county courts, elected in November, 1946, may take office on January 1, 1947, only if their taking of office will not affect the term of those holding office on the effective date of Senate Bill 483. These officers were elected and assumed the duties of their office under Section 13283, R. S. Mo. 1939, which provides:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

It is clear that a term of office has been fixed by the above statute. In the case of *State ex rel. Rumbold v. Gordon*, 238 Mo. 168, it is stated at l. c. 177:

"* * * So, agreeably to the same end, it is good doctrine that the maxim, That is certain which can be made certain (Id certum est, etc.) is applied in resolving any doubt on whether a term is granted. Thus, if the beginning is certain, and if the end can be made certain by reference to some mentioned certainty, a term is granted. * *"

Therefore, their term of office would run from the first Monday in January of 1943, to the first Monday in January of 1947. As we have noted before, the proviso in Section 2 of Senate Bill 483 prohibits the taking of office of a new county clerk from affecting the term of the county clerk now in office.

Hon. Forrest Smith

-4-

Conclusion

It is, therefore, the opinion of this department that the clerk of the county court who held office on July 12, 1946, will not be relieved of his duties until the first Monday in January, 1947.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:EG

HABITUAL DRUNKARDS: There is no authority for the confining
of an habitual drunkard, who does not have
PROBATE COURT: manifestation of insanity, in the state in-
sane asylum.

March 25, 1946

FILED

84

Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Spencer:

This will acknowledge receipt of your letter of March 21, 1946, in which you request an opinion of this department, as follows:

"I would appreciate an opinion from your department as to whether or not a habitual drunkard could be sent to the insane institutions and the county pay the expense of such care and keep."

A thorough examination of the statutes of Missouri reveals no section expressly authorizing the confinement of a person in a state hospital for the insane for habitual drunkenness. If such authority exists, it must be such as is implied from the terms of another statute. We think the question presented here is one of whether such implied authority exists under Section 509, R.S. Mo., 1939, referred to in your letter, since a careful examination of the statutes has convinced us that it exists nowhere if it does not exist by virtue of said section. Section 509 reads as follows:

"If information, in writing, verified by the informant on his best information and belief, be given to the probate court of any county that any person in its county is so addicted to habitual drunkenness or to the habitual use of cocaine, chloral, opium or morphine as to be incapable of managing his affairs, and praying that an inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind, and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in section 451, and shall publish the same notice mentioned in section 473;

also, shall file an inventory and appraisalment, made under the provisions mentioned in sections 461 to 468, both inclusive."

The paramount rule in construing a statute is to ascertain the intention of the Legislature. U.S. v. N.E. Rosenblum Truck Lines, 62 S.Ct. 445, 315 U.S. 50; Artophone Corp. v. Coale, 133 S.W.(2d) 343, 345 Mo. 344; Statutes in pari materia (i.e. those relating to the same subject matter,) must be considered together. Whaler v. Buchanan Co. 111 S.W.(2d) 177, 342 Mo. 33. With these rules of statutory construction in mind, we think the intention of the Legislature in enacting Section 509, supra, was restricted to authorizing the Probate Court of a county to appoint a guardian for a habitual drunkard. Section 509, supra, provides that the Probate Court shall proceed "therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind". The section also refers to Sections 451, 461 to 468, and 473, R.S. Mo., 1939. Section 509, supra, therefore, refers to Art. 18, of Chap. 1, of the Revised Statutes of Missouri, which Article contains the sections immediately preceding Section 509, supra. Article 18 refers primarily to the appointment of guardians for insane persons and the duties of said guardians, and, in this respect, could, of course, be no authority for confinement of either an insane person or an habitual drunkard.

That part of Article 18, which deviates from the general subject of guardians, contains the following sections, which read as follows:

Section 497:

"If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Section 498:

"If any such person of unsound mind, as in the last preceding section is specified, shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Since Section 509 specifically refers back to Article 18, we think that the sections above quoted apply to habitual drunkards, as well as to all other persons, if the habitual drunkard falls within the terms of these sections. However, a reading of Sections 497 and 498 will show that, to come within these terms, a drunkard must be "feriously mad, or so far disordered in his mind as to endanger his own person, or the person or property of others". The latter is, of course, tantamount to insanity. These sections, therefore, are no authority for the confinement of habitual drunkards, as such, the latter being distinguished from drunkards who have a mental disorder dangerous to themselves or others.

The sections of the statutes pertaining to admission to the state hospitals for the insane, make no provision for the admission of habitual drunkards, as such. (Sections 9321 to 9359, R.S. Mo., 1939). Section 9321, R.S. Mo., 1939, provides, in part, as follows:

"Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. * * *"

Since these sections deal with the same general subject of admission of patients to the state hospitals for the insane, they must be read in connection with the sections referred to in the first part of this opinion. So read, they lend additional weight to the conclusion that Section 509, supra, was intended to provide merely for the appointment of guardians for habitual drunkards, since they specifically designate as entitled to admission to the state hospitals only those who have some form of insanity.

We find no cases with which to support any theory that habitual drunkards, without insane proclivities, may be confined to a state insane institution. On the contrary, we think the general trend of the cases indicates the opposite. In *Darby v. Cabanne* (1876) 1 Mo. App. 126, the court of appeals referred to what is now Section 509, supra, as a statute providing for the appointment of guardians. The court said: (l.c. 129)

"* * * Our law provides for appointing a guardian for such persons, though they be not of unsound mind, or idiots, or lunatics. Wag. Stat. 178, sec. 52. * * *"

In *ex parte Griggs* (1923 Appeals) 248 S.W. 609, 214 Mo. App. 304, the Kansas City Court of Appeals held that a girl could not be committed to the State Home for the feeble-minded except by virtue of the statute relating to the admission of patients to that home. The court said: (l.c. 610)

"* * * The institution at Marshall is not a state hospital, and the only way in which persons are admitted thereto is contained or provided for in section 12391, R.S. 1919. It follows, therefore, that the restraint and control over petitioner by the respondent, as superintendent of the colony for feeble-minded, is without authority of law, and she should be discharged therefrom. * * *"

While this case dealt with admission to a different state institution, it indicated that patients are to be admitted to state institutions only within the terms of the statutes relating to any such institution which set out the requirements for admission. Certainly this is true in the absence of other statutory provisions specifically authorizing certain people to be admitted. This rule must, therefore, be applied to the instant situation, and as pointed out above, there is no authorization for the admission of a habitual drunkard to the state hospitals for the insane in the sections dealing with said hospitals.

The courts have always been meticulous in protecting the rights of citizens to the due process of law in proceedings which result in the deprivation of their liberty. Thus, in *ex parte Higgins v. Hootor* (1933) 62 S.W. (2d) 410, 332 Mo. 1022, the Supreme Court of Missouri held that, where a person had been confined in an insane hospital by a temporary restraining order of the Probate Court of St. Louis County,

acting under what are now Sections 497 and 498, R.S. Mo., 1939, the person must be given a final adjudication of the fact of insanity. The court in that case said: (l.c. 1038 & 1039)

"* * * While the statutes covering the whole subject of insanity are constitutional and amply safeguard the rights of persons whose sanity is inquired into, the probate courts should observe the spirit as well as the letter of these laws. Acting under Sections 498, 499, Revised Statutes 1929, it was proper for the court to order the temporary restraint and confinement of Mary E. Moynihan if it had reasonable grounds to believe that she was 'so far disordered in her mind as to endanger her own person or the person or property of others.' 'As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason, it follows, . . . that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as may be necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.' (Buswell on Insanity, p. 33, sec. 23. See, also, notes, 10 A.L.R. 488 and 45 A.L.R. 1464.) But even in such circumstances, it should be remembered that the preliminary order authorized by Sections 498, 499, Revised Statutes 1929, is not a valid final adjudication of the fact of insanity. The hearing provided by Section 452, Revised Statutes 1929, must still be had and the person suspected of insanity still 'is entitled to be present at said hearing and to be assisted by counsel,' as stated in the notice required by Section 450, Revised Statutes 1929. * * *

This case indicates the diligence of the courts in insisting upon all possible safeguards against the deprivation of individual liberty in such cases. The rule protecting the rights of one actually insane would, without question, be even more applicable to one who is not so greatly afflicted.

CONCLUSION.

It is, therefore, the opinion of this department that an habitual drunkard, without any manifestation of insanity, could not be sent to the state insane institution.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

**ELECTIONS: Necessary qualifications for
NOTICE: newspaper to publish notice.**

May 10, 1946



513

Mr. George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"On this morning's mail I received two copies of 'The Tri-County Truth', one is dated April 4th and the other is dated April 18th. I do not know whether the issue for April 11th has ever been published or not.

"It is not unusual to receive two or three issues on the same mail of this paper and, although it appears to be a weekly and published weekly, it does not come out each week but as stated above at least two or maybe three copies come out at the same time.

"This is the only republican paper in the county. The question with the County Clerk and myself, is such a legal newspaper under these circumstances that requires publication of the notices of election in such a publication."

Replying thereto, it appears that Section 11555, R.S. 1939, requires the county clerk to publish names of candidates and certain other information, and says:

"* * * It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

Section 11556, R.S. 1939, states:

"Every publication required in this article shall be made in not less than two newspapers of general circulation in such county; one of such newspapers shall represent the political party that cast the largest vote in such county at the preceding general election, and one of such newspapers shall represent the political party that cast the next largest vote in such county at the preceding general election. In any case where the publication of notice cannot be made as hereinbefore required, it may be made in any newspaper having a general circulation in the county in which the notice is required to be published."

46 C. J., page 19, describes a newspaper thus:

"* * * In ordinary understanding a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest."

As to its circulation it says, page 19:

"That the circulation of a publication is very limited does not prevent its coming within the definition of a newspaper."

You do not give us detailed information as to the contents of the paper, and we assume it is a newspaper within the usual meaning of that term, although perhaps it is not "as deep as a well nor as wide as a barn-door but 'tis enough."

While the statute, Section 11555, places the duty upon the county clerk to "publish such notice for three consecutive weeks," it, when read in connection with Section 11556, means, of course, that the clerk shall direct it to the newspapers in question and that they "publish" the notice.

46 C. J., page 22, speaking of a "newspaper of general circulation," states as follows:

"'Newspaper of general circulation' is a term generally applied to a newspaper to which the general public will resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the notices or official advertising will be brought to the attention of the general public. As to whether a newspaper is of general circulation is manifestly a matter of substance, and not merely of size. The term 'general circulation' is a relative one, and its meaning must be determined by a process of inclusion and exclusion. That which will be of general circulation in a town of a small population cannot be said to be general in a populous city. A newspaper to have the characteristics of a newspaper of general circulation does not necessarily have to be read by all the people of the county. The question as to whether or not a newspaper is one of general circulation involves other elements besides the number of its subscribers, and the size of the community in which it is published and circulates. The patent inside do not affect the status of a newspaper as that of a newspaper of general circulation so long as the paper otherwise meets the necessary requirements of a newspaper of general circulation."

Section 11556, supra, requires that the newspaper to which said publication shall be directed shall be of "general circulation in such county." From your letter it appears that the newspaper in question represents one of the two major political parties. Said statute, 11556, further provides that in case there are no such newspapers of the two political faiths and of general circulation in the county, the publication may be made in any newspaper having a general circulation in the county in which the notice is required to be published. Said section would seem to mean that the clerk must publish said notice in at least two newspapers of general circulation, and if there is not a newspaper of each of two major political parties and of general circulation and published in consecutive weeks, then it would be the duty of the clerk to have said publication made in newspapers that did meet with the statutory requirements.

From your letter it appears that serious question may be raised as to whether the newspaper here considered is a proper newspaper in which to have the statutory publication made, because your letter impliedly says that the newspaper is not published each week.

The term "week" has been construed by our courts, as well as by many other courts. In *Russell v. Croy*, 164 Mo. 69, the question was raised as to what was the meaning of the publication for "four consecutive weeks." The object of the suit was to prevent the defendants from enforcing against the plaintiffs the terms of the third constitutional amendment voted on and declared adopted at the general election in November, 1900, purporting to relieve the owner of the equity of redemption of mortgaged farm lands to the extent of the mortgage placed thereon and to tax the mortgage instead of that much of the value of the land. Plaintiff contended the constitutional amendment was not legally adopted, because the publication in the newspapers over the state was not legally made. The court held to the contrary and that the amendment was properly adopted. At l.c. 93 the court said:

"The Constitution uses the words 'four consecutive weeks.' The word 'week' in its most accurate sense means seven consecutive days beginning with Sunday; in that sense it is most usually used. But it is also appropriately used to mean seven consecutive days beginning with any day. * * * *"

Mr. George A. Spencer

-5-

From your inquiry it appears that at least the copies of the purported weekly issues that are received by you as a subscriber appear to be printed for two weeks at one time, or at least circulated at one time. You say, "at least two or maybe three copies come out at the same time."

In State ex rel. v. Johnson County Court, 138 Mo. App. 427, it is held that the date of publication of a newspaper is not necessarily the date when it is printed. At page 431 the court said:

"* * * * The publication of a notice in a newspaper is not the day it is set up in type and printed; it is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher. * * * *"

Conclusion.

It is our opinion that a newspaper should have the qualifications above mentioned, to wit, it should be a newspaper of general circulation in the county and it should be published each week, and by the word "published" is meant it should be distributed to the public of the county each week in order for it to qualify as a proper newspaper to which the county clerk shall award a publication under the above statutes. If such newspaper does not come within these provisions, then the county clerk is not only within his rights, but he is exercising his statutory duty in publishing said notice in two other newspapers which do have the above set forth qualifications.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

SOCIAL SECURITY COMMISSION: Section 8, Article VII, Constitution, 1945, applies to officers and not employees.



May 15, 1946

5/24

State Social Security Commission
Jefferson City, Missouri

Attention: Mr. Proctor N. Carter

Gentlemen:

This will acknowledge receipt of your request for an official opinion, which letter reads:

"Senate Bill 349, recently passed by the General Assembly, establishes a State Department of Public Health and Welfare. In Section 7 of this bill it is provided that;

"All employees of the department of public health and welfare shall be persons of good character and integrity and citizens of this state for at least two years next before taking the examination. * * *

"The Constitution of Missouri, 1945, Article VII, Section 8, provides as follows;

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge." (Underscoring ours)"

"It is my understanding that the above constitutional provision is substantially the same as the previous provision on this subject with the exception of the new matter, or addition, as underscored above.

"As I have previously advised you, we have found it increasingly difficult to recruit, hire and retain professionally trained social workers to fill certain key positions in our organization. I refer only to positions in this agency which require graduate training in recognized and accredited schools of social work. These positions, we consider to be of a technical nature requiring specialized knowledge.

"Question:

"(1) Does the new matter or exception in Article VII, Section 8, Constitution of Missouri 1945, relate only to, and apply to, public officers, or does it apply to any person appointed to an administrative position requiring technical or specialized skill or knowledge?"

Section 10, Article VIII, of the Constitution of 1875 reads:

"No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment."

Section 8 of Article VII of the Constitution of 1945, practically follows the language used in the foregoing Constitutional amendment and adds thereto that part underscored as hereinafter shown.

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge." (Under-scoring ours)

Under Section 10, Article VIII, supra, the decisions all hold that said provision pertains solely to officers and not employees.

See Kirby v. Nolte, 164 S. W. (2d) 1, 1.c. 9 and 10 wherein the court held that the director of personnel in St. Louis was an officer and not an employee and, therefore, comes within the provision of Section 10, Article VIII, supra, prohibiting officers from being appointed unless they have resided in this state at least one year immediately preceding their appointment.

The question now is, does the underscored portion of Section 8, Article VII, supra, apply solely to officers or does it apply likewise to employees? There is a well established rule of statutory construction that a statute should be construed so as to ascertain and give effect to the legislative intention expressed therein. (See Wentz v. Price Candy Co., 175 S. W. (2d) 852, 352 Mo. 1, also American Bridge Co. v. Smith 179 S. W. (2d) 12, 352 Mo. 616). The courts have also ruled that construction applicable to statutes also applies to the construction of Constitutions. (See State ex rel. Buchanan County v. Emil, 146 S.W. 783, 242 Mo. 293). Also the courts have held that members of constitutional conventions are presumed to have known of previous construction given former constitutional provisions by the Supreme Court and that in adopting, in a later Constitution, words and texts of another which has been construed by a court of last resort is presumed, in the absence of contrary intention, to have been done to give the adopted words their adjudicated meaning. In Ludlow-Saylor Wire Co. v. Wollbrinck, 205 S. W. 196, 275 Mo. 339, 1.c. 355, the court said:

" * * * The rule is firmly settled that the adoption in a later constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning. (6 R. C. L., p. 54, sec. 49, and cases cited.) * * *"

Under general rules of statutory construction the underscored portion of Section 8, Article VII, Constitution of 1945, refers back to the subject, which is, appointed and elected officers, since the first part of said constitutional provision refers solely to the appointment and election of officers. The underscored part of said constitutional provision merely provides that the residence requirement (not citizenship) shall not be necessary in case of appointment (not elected) to administrative position requiring technical or specialized skill or knowledge. No doubt the delegates at the constitutional convention had in mind the decision rendered by the Supreme Court in State ex inf. v. Bode, 342 Mo. 162, 113 S. W. (2d) 805, wherein the Supreme Court held that Bode was an

officer but that he was not required to have resided in the state one year preceding his appointment, since his appointment was controlled by a later constitutional amendment (Section 16, Article XIV, Constitution of Mo.) which created the Conservation Commission and which left the appointment of Bode, the director, to the State Conservation Commission.

Position has often been defined to be analagous to office. In *Frazier v. Elmore*, 173 S. W. (2d) 563, 1.c. 565, 180 Tenn. 232, the court said:

" * * * Webster defines 'office' as an 'assigned duty or function.' Synonyms are post, appointment, situation, place, position; and 'office' commonly suggests a position of (especially public) trust or authority.' Bouvier defines 'office' as 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it'; again, 'a public charge or employment.' 2 Bouv. Law Dict., Rawles Third Revision, p. 2401. The opinion of this Court in *Jones, Purvis & Co. v. Hobbs*, 63 Tenn. 113, at page 120, quotes Blackstone's definition of office as 'a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging.'"

See also *Risley v. Board of Civil Service Commissioners of City of Los Angeles*, 140 P. (2) 167, 169, 60 Cal. App. (2) 32.

CONCLUSION

It is, therefore, the opinion of this department that the exception in Section 8, Article VII, Constitution of 1945, applies only to persons appointed or elected to some civil or military office and does not apply to employees. That had it been the intention of the framers of said constitutional provision to have same apply to employees as well as officers it would have been an easy matter for them to have included such a provision in clear and unambiguous terms.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:LR

SCHOOLS

President and Clerk of School District attending county school meeting entitled to 5¢ per mile going and returning.

FILED

84

May 17, 1946

Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Spencer:

This Department is in receipt of your request for an official opinion which reads as follows:

"The question has arisen here concerning the payment of mileage to the President and Clerk of the School Board under Section 10624 Revised Statutes of Missouri, 1939. This statute provides in part:

"a. And each school officer attending such meeting shall receive compensation at the rate of one dollar fifty cents (\$1.50) per diem and mileage at the rate of five (5¢) cents per mile for the number of miles necessary to be traveled in going from the school house of his district to the place of meeting"

"The question is, are these officers entitled to five cents (5¢) per mile each way or does that mean five cents (5¢) a mile for only one way."

Section 10624, R.S. Mo. 1939, provides, in part, as follows:

"It shall be the duty of every president of a school board and of every clerk of a school district in the several counties to attend

the meeting of school officers called by the county superintendent of public schools for the purpose of considering and discussing questions pertaining to school administration; and each school officer attending such meeting shall receive compensation at the rate of one dollar and fifty cents per diem and mileage at the rate of five cents per mile for the number of miles necessary to be traveled in going from the school-house of his district to the place of meeting, same to be paid out of the incidental fund of his district: * * * ".

It is well settled in this State that no officer is entitled to fees of any kind unless provided for by statute, and the law conferring such right must be strictly construed because of statutory origin and right. Ward vs. Christian County, 341 Mo. 1115, 111 S.W. (2d) 182; Smith vs. Pettis County, 345 Mo. 839, 136 S.W. (2d) 282.

As was said in Maxwell vs. Andrew County, 146 S.W. (2d) 621, 1.c. 625:

"* * *.The specification in the statute of instances when mileage is to be paid and money lawfully be received by the sheriff constitutes an implied prohibition upon its collection in other instances. * * * ".

There are no cases in Missouri which deal directly with this question, but the general rule as given in 57 Corpus Juris, page 1131 is:

"* * * statutes relating to the mileage of sheriffs and constables are construed to allow mileage on a circular or round trip basis, or, in other words, for each mile traveled on the journey, not only going but also returning; * * * ".

It will be noted that the statute provides that the mileage will be paid for the miles traveled "from the school house of his district to the place of meeting."

Honorable George A. Spencer -3- May 17, 1946

The Supreme Court of Iowa in the case of Harding vs. Montgomery Co., 55 Iowa 41, 7 N.W. 396, had before it for construction a statute which provided as follows:

"* * * 'For conveying each convict to the penitentiary, and as full compensation therefor, 16 cents for each mile traveled, to be computed from the county seat where the conviction took place by the most direct route of travel; the same to be paid out of the county treasury.'"

The above statute is very similar to Section 10624, supra, and the Iowa Court held as follows:

"We think a fair construction of this language is that payment should be made for each mile traveled on the journey going and returning. It is said that the allowance is for conveying the convict to the penitentiary, and that means only the actual travel from the county seat to the penitentiary. But it seems to us it is a fairer and more rational construction of the language to hold that it means payment for the travel made necessary to accomplish the purpose, which is to convey the person to the penitentiary. It is not to be supposed that a sheriff, who is required to keep his office at the county seat, would not necessarily return to that place. While the question is not free from difficulty, we think the court below determined it correctly. * * * "

In view of the above authority it is believed that, the President of the School Board and the Clerk

Honorable George A. Spencer -4-

May 17, 1946

of the school district attending a meeting called by the County Superintendent of Public Schools is entitled to mileage at the rate of five (5¢) cents per mile for each mile that they may travel in going from the district school house to the place of the meeting and returning.

CONCLUSION.

It is, therefore, the opinion of this Department that, the President of a school board and the clerk of a school district attending a meeting called by the County Superintendent of Public Schools under Section 10624, R.S. Mo. 1939, are entitled to mileage at the rate of five (5¢) cents per mile for each mile traveled from the school house of the district to the place of meeting and return to the school house.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

2 p
J. Smith
CONSTITUTIONAL LAW:
OFFICERS:
MAGISTRATES:

Under Section 25, Article V, Constitution, 1945; and Section 3, Senate Bill 207, a de facto officer claiming the office of justice of the peace on February 27, 1945, cannot qualify for the office of magistrate where such officer is unlicensed to practice law.

June 4, 1946



Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

Receipt is acknowledged of your letter of recent date, which was submitted in connection with your original request for an official opinion of this department. Your letter, setting forth the facts pertaining to the question on which an opinion was requested, reads in part as follows:

"As I understand the facts, they are as follows: That at the Democratic Primary of 1942, one M. F. Thurston, Jr., David V. Bear, and Temple H. Morgett were nominated, and were elected without opposition at the November election in that year and were commissioned for terms of four years.

"Prior thereto, Morgett had been commissioned for a four year term in 1938; Bear was appointed to serve as a result of the resignation of another justice of the peace; and Thurston was appointed to serve after the resignation of the third justice of the peace, prior to that time.

"After the election in 1942, Bear and Morgett entered the army and did not resign their offices. Thurston, on the 2nd day of January, 1943 resigned his office, and George S. Starrett was appointed and commissioned to fill his vacancy caused by this resignation on the 4th day of January, 1943 and to hold office until the next election, or to hold office until his successor was elected and qualified.

"George S. Starrett and George F. Mansur filed declarations of candidacy in 1944 for the Democratic Nomination for Justice of the peace subject to the Democratic Primary to be held in August. The County Clerk put both names on the ballot with the instruction, 'Two to be elected'. The vote for the office in the Primary was Starrett 3,071 and Mansur 2997. Both names were placed on the ballot at the General Election as the Democratic Nominees for the office. Starrett received 6,034 votes and Mansur 6,031 for the General Election. Both were later qualified and commissioned for four year terms.

"Mansur now has filed for the office of Magistrate as has Morgott.

"The question raised is, whether or not Mansur may run for the nomination of Magistrate. It is understood that he is not a lawyer but has been acting as Justice of the Peace since his commission under which he now holds. The question, of course, comes up under the New Constitution of the State of Missouri and Section Three of Senate Bill Number 207, 63rd General Assembly."

In considering the question whether or not Mansur can qualify for the office of magistrate under Section 25, Article V of the Constitution of 1945, and Section 3 of Senate Bill 207, we must first determine what his status has been while he has been acting as justice of the peace.

There were no vacancies created when Bear and Morgott entered the army and did not resign. In the case of State ex. inf. McKittrick v. Wilson 350 Mo. 486, 165 S. W. (2d) 499, 143 A. L. R. 1465, it was decided by the Supreme Court that a person holding a public office did not vacate his office by being inducted into the army or by volunteering. The tenure of office for Bear and Morgott, who were elected in 1942, was for four years. Consequently, their respective terms would run until 1946. Therefore, in the general election of 1944, there was only one justice of the peace to be elected to the office which had formerly been held by Thurston.

However, it appears that the county clerk and the county court believed that another vacancy existed which had to be filled in the election of 1944. This belief was manifested by the instruction placed on the ballot in the primary election, "Two to be elected," placing Mansur's name on the ticket in the general election after he had received a lesser number of votes in the primary and commissioning both Starrett and Mansur after the general election.

Prior to the August primary, both Starrett and Mansur had filed declarations of candidacy for nomination for the office of justice of the peace. Since there was really only one justice of the peace to be elected, only one of them could receive the nomination, and according to the returns of the primary election in August, Starrett won the nomination.

Although the county clerk had placed the erroneous instruction on the ballot, "Two to be elected," the election was valid.

In the case of Application of Lawrence, 185 S. W. (2d) 818, there was involved the interpretation of the election laws pertaining to absentee ballots. Regarding the interpretation of election laws in general, the following was said at l. c. 820:

"* * * * Election laws must be liberally construed in aid of the right of suffrage.'
* * * *"

In the case of Nance v. Kearbey 251 Mo. 374, 158 S. W. 629, which was cited with approval in the Lawrence case, supra, the county clerk had placed certain nominees for office submitted by petition before the general election under a wrong heading on the official ballot. Later a suit was brought to contest the election because of the irregularities that appeared on the ballots. Regarding the interpretation of the election laws, the following appears at Mo. l. c. 383:

"The very taproot and reason for any election at all among a free people, is that the majority may rule; hence there are two main settled and uniform rules of interpretation, thus:

"First: Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. l. c. 651; Hale v. Stimson, 198 Mo. 134.) The whole tendency of American authority

is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"Second: The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Cass v. Evans, 244 Mo. 1. c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. 1. c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q. B. Div. 245.)' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422.) In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

We believe that there is nothing in our election laws that would make the irregularity which appeared on the ballot of the 1944 primary election so vital as to be fatal to the entire election. The result of that election gave Starrett the most votes; consequently, only his name should have been placed on the ballot in the general election. So far as Mansur was concerned, after being defeated in the primary election for the

one existing office of justice of the peace, he should have no longer been considered for that office in the general election. Although, through the error of the county clerk, Mansur's name was placed on the ballot in the general election of 1944, he was not elected to the office of justice of the peace, nor did this error vitiate the election in view of the reasons and authority cited for upholding the primary election of 1944.

Apparently Mansur has been assuming the duties of an office which was erroneously believed to be vacant due to the former holder's having entered the service. He has only been claiming the office under color of an election which did not legally seat him in office and entitle him to the lawful right or title to such office. As to him, the election was void; and, therefore, he is only a de facto officer.

In Volume 43 Am. Jr., Section 471, page 225, is the following definition of a de facto officer:

"* * * * A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.
* * * *" (Emphasis ours.)

In the case of State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S. W. (2d) 929, there was a proceeding in mandamus to compel the State Auditor to register a bond issued by the City of Republic. The Board of Aldermen had passed an ordinance calling the election on the bond issue, and it was contended that the election was invalid because one of the aldermen who had voted for the ordinance was not legally entitled to the office; and, therefore, was not entitled to vote on the ordinance. He had been appointed by the mayor after one member had moved from the city but had not resigned, and it was conjectural whether or not a vacancy existed when the mayor made his appointment. In determining the status of the alderman who had been appointed by the mayor, the following was said at S. W. l. c. 933:

"Moreover, we are of the opinion that Dr. Mitchell was at least a de facto alderman. 'An officer de facto is to be distinguished from an officer de jure, and is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. He is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being

unknown to the public.' McQuillin Municipal Corporations, 2nd Ed., Revised Vol. 2, Sec. 500, Page 204.

"Dr. Mitchell held his office on the Board of Aldermen under an appointment of the mayor of relator, he exercised the duties of this office under this appointment, and he was held out to the public as an alderman. We are therefore of the opinion that, although Section 6957 may not have been strictly complied with, he was at least a de facto officer."

In the Smith case, supra, a person was holding an office which had not been vacated under color of an appointment, and in the case at bar Mansur is holding an office which was not vacated under color of an election. We believe that the rule applied in the Smith case to determine the status of the office holder is applicable in the instant case.

Although Mansur has been a de facto officer and has had no legal title to the office, the official acts which he has performed in connection with the office which he has been claiming have been valid. It has generally been held that the official acts performed by a de facto officer in connection with his office are valid, and cannot be attacked collaterally simply because he did not have legal title to the office he was claiming. The rule has been stated as follows in Fleming v. Mulhall et al., 9 Mo. App. 71 l. c. 72:

"It is well settled that the acts of an officer de facto, whether judicial or ministerial, are valid so far as the rights of the public, or of third parties having an interest in such acts are concerned."

The reason for holding valid the acts of de facto officers is based on a necessity to preserve the rights of third persons, and to prevent a breakdown in organized society. Thus, it was stated in Adams v. Lindell, 5 Mo. App. 197 l. c. 202;

"* * *The act of the so-called officer being thus contrary to law, as he has no right to the office, the de facto principle

is applied, and thus an otherwise void act is validated, not because of any character or quality attached to the so-called officer or to his office, but because this is necessary to preserve the rights of third persons and keep up the organization of society. The rule is based merely on policy, and its origin and historical development show that it is founded in comparative necessity. If the citizen is in no way in fault, if in his dealings he trusts to the non-legal authorities in whom all believe, his rights are not to be destroyed.
* * * *

Section 25, Article V of the Constitution of 1945 provides the qualifications for magistrates, and in part reads as follows:

"* * * * Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."
(Emphasis ours.)

Pursuant to the power vested in the General Assembly to provide for the administration of magistrate courts, Senate Bill 207 was passed, and Section 3 of that law, which prescribes the qualifications for magistrates, in part reads as follows:

"Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court

without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being licensed to practice law. * * * * (Emphasis ours.)

It is a cardinal rule of constitutional and statutory construction that a constitutional or statutory provision must be construed in consonance with the intent of the framers of the Constitution and the people who adopted it, and with the intent of the lawmakers who enacted the law, as the case may be.

In the case of *Graves v. Purcell*, 85 S. W. (2d) 543, 337 Mo. 574, the rule was stated as follows at S. W. 1. c. 547:

"In determining the true meaning and scope of constitutional or statutory provisions, the intent and purpose of the lawmakers is of primary importance.
* * * *

In construing the language of a constitutional or statutory provision nontechnical words are to be understood in their usual and ordinary sense. In this connection, the following was said concerning the construction of constitutions in *State v. Adkins*, 225 S. W. 981, 284 Mo. 680, at Mo. 1. c. 693:

"Concerning the construction of constitutions it has been well said that:

"'Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt

them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' * * *"

Section 25, Article V of the Constitution of 1945, supra, provides that persons who are now justices of the peace shall be eligible to the office of magistrate although they are unlicensed to practice law. The language used contains no technical nor unusual words, and applying the usual and ordinary meaning of the words appearing therein, and by not attempting to apply any complex judicial interpretation, we believe that the framers of the Constitution and the people who adopted it intended that those persons who are now justices of the peace, meaning on the date that the Constitution was adopted, February 27, 1945, should be holding their offices by virtue of a valid appointment or election and must have the clear and legal title to such office before they can qualify for the office of magistrate, unless they are licensed to practice law.

The language of Section 3, Senate Bill 207, supra, is very similar to that language appearing in the Constitution and employs words of ordinary usage. The Legislature did not intend that a meaning be given to such language that would be contrary to the meaning of the similar language in the Constitution. Therefore, under the provisions of Senate Bill 207, a person not licensed to practice law must have been holding the office of justice of the peace on February 27, 1945, under a legal right and title to such office.

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that Mansur was not duly elected to the office of justice of the peace in the general election of 1944, and that during the time he has been acting as justice of the peace he has not had the legal right and title to such office, but has only been a de facto officer. Under Section 25, Article V of the Constitution of 1945, and Section 3 of Senate Bill 207,

Hon. George A. Spencer

-11-

for persons, who are not licensed to practice law, to be eligible for the office of magistrate they must have had the legal right and title to the office of justice of the peace on February 27, 1945, or, must have heretofore been a justice of the peace in the state for at least four years.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:LR

RECORDER OF DEEDS: Five questions concerning fees for listing and issuing verified copies of discharges in county of the third class under H. B. 772.

July 5, 1946



Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We heroby acknowledge receipt of your request for an opinion which reads as follows:

"We have a number of problems that are arising as a result of House Bill Number 772, which permits the Recorder to collect from the county for the list of veterans discharges and giving a copy of the discharge.

"The questions that arise are as follows:

"1. Is the Recorder permitted to charge fifty cents (50¢) for the listing and an additional fifty cents (50¢) for the copy?

"2. When does the bill go into effect so that he can collect from the county for such service?

"3. Should he make an alphabetical list of all resident discharged veterans in Boone County whose discharge papers have previously been recorded, or can he collect only for those recorded after the effective date of the bill?

"4. If the veteran wants more than one copy, is the Recorder required to furnish as many copies as he wants free of charge, or does the veteran pay for the additional copies?

"5. In Boone County we have a particular problem of students coming to school and desiring their discharges to be recorded and certified copies made. Should the Recorder refuse to record those discharges and require them to record them in their home county and get their certified copies there, or is he required under previous laws to record them and make them free, or can he record them and require the veteran to pay for the service?

"I presume that you have answered most of these questions previously and if you have copies of other opinions solving our problems I would appreciate receiving them."

Section 2 of E. B. 772, the basis for your request, provides:

"Section 2. In all counties of the third class wherein the offices of the circuit clerk and recorder of deeds are separate, the recorder of deeds shall, in addition to the duties imposed upon him by law, and by virtue of this article, have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the Armed Forces of the United States, which list shall show such veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the Armed Forces of the United States one certified copy of such discharge upon request of such veteran, or if such veteran shall have deceased

since the recording thereof, then by his heir, executor or administrator. For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees in determining the maximum amount which the recorder may retain as set forth in Section 1 hereof. Provided, however, that no such recorder shall be paid for the listing of any non-resident of the county, nor for the listing of any such discharge which has previously been so listed in any county, nor for any additional verified copy after the first. A veteran shall be deemed a resident of the county for the purposes of this section if he shall have resided in the county prior to his induction into the Armed Forces, and shall have returned there upon his discharge, or if he shall have resided in the county for more than ninety days next prior to the recording of such discharge with the intention of making the county his domicile."

2

It is well at the outset to emphasize that this section applies to counties of the third class wherein the offices of circuit clerk and recorder of deeds are separate, and, therefore, this opinion affects only such counties.

We will take the questions set forth in your request in the order that they appear. That part of H. B. 772, which deals with the first question, provides:

"For each name which the recorder shall append to the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury * * *."

It is to be remembered that in answering question one, we are dealing only with veterans who qualify as residents of the county. In order to answer this question we must determine

whether the listing and the certified copies are each entitled to a fifty cent charge to total one dollar or whether they must be taken together to total fifty cents.

The rule as set out in the case of *Haynes v. Unemployment Compensation Commission*, 133 S. W. (2d) 77, 1. c. 81, is:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, * * * * *
Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925; *Artophone Corporation v. Coale*, 345 Mo. 344, 133 S. W. 2d 343, 347.
'Words and phrases (of a statute) shall be taken in their plain or ordinary and usual sense' (Sec. 355, R. S. 1939, Mo. R.S.A.), * * * * *

In this light the word "sum," used in the above cited phrase, is defined in Webster's Unabridged Dictionary as: "An amount; as, to receive occasional sums of money; an indefinite (unless specified) amount or quantity of money or currency; * *"

The word "sum" does not necessarily infer that the particular amount of money (50¢) is the result of totalling two or more amounts to arrive at that amount. To the contrary, the very language used in the phrase in question is to the effect that for "each" act the recorder should receive the sum of fifty cents. By way of interpolation the same phrase should be read as though it stated - for each name which the recorder shall append to the aforesaid alphabetical list the said recorder should receive the sum of fifty cents, and for each certified copy of such discharge as he shall furnish the said recorder should receive the sum of fifty cents. This would amount to a total of one dollar to be charged to the county treasury as the result of the performance of both the act of recording and the act of issuing one verified copy of the discharge of a resident veteran.

We must go farther than this, however, and look to the Constitution of Missouri, 1945, Article VII, Section 13, where it is provided:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This section is patterned after Article XIV, Section 8 of the Constitution of Missouri, 1875.

In the case of State ex rel. Harvey vs. Sheehan, 190 S. W. 864, 269 Mo. 421, wherein the Legislature enacted a law requiring the circuit attorney of the City of St. Louis to attend coroners' inquests in cases of death caused by violence, which might result in charges of felony, an act he was not previously required to do, and for such attendance the circuit attorney should receive \$10 for each inquest to be paid by the city. It was claimed that since the circuit attorney was an officer at the time of the passage of the Act, he could not receive this amount since the Constitution prohibited any increase in the pay of an officer during his term of office. The Supreme Court of Missouri, 1. c. 429, held:

"* * * We think this contention unsound because the act in question enjoins upon such officers as appellant now and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 165 Mo. 270; State ex rel. v. Walker, 97 Mo. 162; State ex rel. v. Ranson, 73 Mo. 89; State ex rel. v. McCoyney, 92 Mo. 429; County v. Felts, 104 Cal. 60; State ex rel. v. Board of Commissioners, 23 Mont. 250; State ex rel. v. Carson, 6 Wash. 250; Love, Attorney-General v. Baehr, Treasurer, 47 Cal. 364; Purnell v. Mann, 105 Ky. 87; Lewis v. State ex rel. 21 Ohio C.C. 410.)

"It is our opinion that the act is valid and that the appellant is entitled to the fees demanded and that the respondent

was not justified in refusing to audit the account and draw a warrant therefor on the city treasury."

In applying this principle to your question it becomes paramount to determine whether an additional duty has been added, so as to entitle the incumbent recorder to those fees.

It may certainly be said that the separate alphabetical list of the names of all residents of the county who have been discharged from the armed forces of the United States constitutes an additional duty to the office of the recorder since, prior to this legislation, such duty was in-existent. Therefore, the recorder is entitled to the 50¢ fees involved in the performance of this duty, and Article VII, Section 13, *supra*, does not prohibit payment of this fee during the term of the present recorders.

The second duty required of the recorders concerns the issuing of discharges to the veterans, or their heirs, on request. This was a function of the recorder prior to House Bill #772, and does not constitute a new and additional duty to that office, and, therefore, falls within the restriction of Article VII, Section 13, of the Constitution of Missouri, 1945. The 50¢ fee allowed for the issuance of the first verified copy would not, therefore, be a proper charge against the county treasury in favor of the incumbent recorders during their terms. This fee will be due to the recorders who are elected at the succeeding election for those verified copies issued by their successors. The present recorder shall issue the verified copies as though House Bill #772 had never been passed, and in accordance with Section 15077, R. S. Mo. 1939, as discussed herein later.

Concerning question two, H. B. 772 was not passed with an emergency clause. It was signed on March 19, 1946. It will, therefore, be effective as of July 1, 1946, and the recorder, therefore, may not collect the fees referred to in question one until that date.

In answer to question three, H. B. 772 provides in part:

"Section 2. In all counties of the third class wherein the offices of the circuit clerk and recorder of deeds are separate, the recorder of deeds shall, in addition to the duties imposed upon

him by law, and by virtue of this article, have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the Armed Forces of the United States, which list shall show such veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; * * * * *

Therefore, so far as the first part of this question is concerned the recorder should make an alphabetical list of all resident discharged veterans in Boone County whether their discharge papers are recorded prior to July 1, 1946, or subsequently thereto.

In this regard, a point of confusion may arise from that part of House Bill #772, wherein it is stated:

"* * * Provided, however, that no such recorder shall be paid for * * * the listing of any such discharge which has previously been so listed in any county * * *".

It may appear at first blush by virtue of this latter provision that any discharge recorded before July 1, 1946, would not be a proper charge against the county, since until the effective date of this statute, recorders are not entitled to any fee for recording discharges. However, the emphasis is not to be placed on the fact of present recording but rather on previous (alphabetical) listing, such as is called for by House Bill #772. This law provides for an additional duty of making such a list of the names of resident or intended resident veterans. It would not matter, therefore, whether the discharge had been recorded prior to July 1, 1946, or thereafter, and the recorder would be entitled to 50¢ for each name so listed, regardless of the date upon which the discharge was recorded.

We believe the reason for the doubt expressed in question four lies in that part of H. B. 772 which provides:

"Provided, however, that no such recorder shall be paid * * * for any additional verified copy after the first." This part is a limitation on the provisions ahead of it which provides in substance: That the recorder shall receive for each name appended to the alphabetical list and for each certified copy of the discharge the sum of fifty cents "to be paid out of the county treasury." This merely means that the county may be charged for the one certified copy but not "for any additional verified copy after the first." Any additional copy should be handled under Section 15077, R. S. Mo. 1939, which provides:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

This section has not been affected by H. B. 772 and if a resident veteran requests an additional copy to be used for any of the privileges specified therein he would be entitled to the additional copy requested without charge. If, however, he desires a copy for some other purpose the recorder would be entitled to charge the person requesting such copy the same fee as for any other certificate and seal.

That part of H. B. 772, upon which the last question is based, is as follows: "Provided, however, that no such recorder shall be paid for the listing of any non-resident of the county, * * *"

As in the discussion to the two previous questions this proviso constitutes an exception to the general provision which immediately precedes it with reference to money being paid out of the county treasury for recording and issuing the first verified copy. It merely means that the county cannot be charged for recording discharges of non-resident veterans.

We must look to the other laws of this state to determine what the rule is with regard to the recording of non-resident veterans' discharges.

Section 15077a, Laws of Mo., 1943, Section 1, page 643, provides:

"Any person who is the holder of a discharge from the Armed Forces of the United States may demand that said discharge be recorded by the recorder of deeds of any county in this State, including the recorder of deeds of the City of St. Louis, and it shall be the duty of said recorder of deeds to record said discharge without any fee or compensation therefor."

This section is not repealed by H. B. 772. So far as the one who is the holder of a discharge of the armed forces of the United States and also a resident of the county is concerned, H. B. 772 will make no difference except that he or she is entitled to one verified copy without charge to that person regardless of the purpose for which it is to be used. Under Section 15077a, supra, one who is a non-resident veteran is entitled to have his or her discharge recorded without charge and in that event the recorder will not be authorized to assess either the veteran or the county for recording the instrument and the law will stand the same after July 1, 1946, as before in this respect. However, the first verified copy of such recorded discharge of a non-resident veteran will not entitle the recorder to a fee of fifty cents from the county treasury and unless such copy is desired for a purpose set out in Section 15077, R. S. Mo. 1939, supra, the recorder may demand and receive a compensation therefor as in the issuance of any other certificate and seal.

CONCLUSION

It is, therefore, the opinion of this department that in counties of the third class wherein the offices of circuit clerk and recorder of deeds are separate; (1) Under H. B. 772 the recorder is entitled to a fee of fifty cents for listing and fifty cents for issuing a verified copy of the discharge of a resident veteran which sums are to be paid out of the county treasury. The incumbent recorder is entitled only to receive the fifty-cent fee for each name listed and not for issuing verified copies of discharges pursuant to Section 15077, R. S. Mo. 1939. His successor in office may collect both. (2) H. B. 772 does not become effective before July 1,

1946, and the recorder may collect the fees referred to in question one only after that date. (3) Under H. B. 772 the recorder should make an alphabetical list of all resident discharged veterans regardless of the date of the recording of their discharges, and he may collect a fee from the county treasury for all names of such veteran listed regardless of the date of recording. (4) If a resident veteran requests more than one verified copy of his discharge, reference should be had to Section 15077, R. S. Mo. 1939, and if he requests such verified copy for a purpose set out therein the copy should be issued without charge, otherwise the recorder is entitled to charge the one to whom such copy is issued the same fee as for any other certificate and seal. In any event this charge for additional copies may not be assessed against the county treasury. (5) The recorder should record the discharge of non-resident veterans and under H. B. 772 no charge may be made against the county treasury for such recording. Under Section 15077a, Laws of Mo., 1943, Section 1, page 643, the holder of a discharge of the armed forces of the United States is entitled to have the same recorded free of charge in any county and this section would apply in the case of non-resident veterans, resident veterans being handled by H. B. 772. If, after the recording of the discharge of a non-resident veteran, any verified copies thereof are desired for the purposes set out in Section 15077, R. S. Mo. 1939, they should be issued free of charge, otherwise the recorder may charge the one desiring said copy the same fee as for any other certificate and seal, but in no event may the charge for such copy be made against the county treasury.

Respectfully submitted

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:DA

ELECTIONS: In Re: It is necessary in a locality where there is registration of voters for the judges of each political party to initial the ballots in a general election.

September 27, 1946

FILED

84

10-15

Honorable George A. Spencer
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Spencer:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department on the following question: Is it necessary, in a city where registration of voters is required, for an election judge from each political party to initial the ballots in a general election?

Section 11602, R. S. Mo. 1939, relating to elections in this state, reads, in part:

"Ballots to be delivered to voter--to be marked how

"* * * *One of the judges shall give the voter one, and only one, ballot, on the back of which two judges of opposite politics shall indorse their initials with ink or indelible pencil in such manner that they may be seen when the ballot is properly folded, and voter's name shall be immediately checked on the register list.* * *"

Section 11607, Laws of Missouri, 1941, page 363, also relating to elections reads, in part, as follows:

"Ballots to be numbered-number to be concealed by sticker

"* * *No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

On the face of these two sections it would appear that there

is no question but that the initialing of the ballots by the judges of the political parties is required. However, the question has been raised as to whether or not the failure to follow the statute in this respect invalidates the ballots not so marked. The leading case on this question is *Hehl v. Guion*, (1900) 155 Mo. 76, 55 S. W. 1024. This case was an election contest case in which the court dealt directly with the duty of the election officials in initialing the ballots and the result of their failure to do so. The court held that the failure to initial the ballots did not necessarily invalidate them. There is significant language in this case regarding the duty of the judges with regard to the initialing of the ballots. At l. c. 83, the court said:

"What was the design of the particular provision of the statute we are now discussing? Why did the legislature require that two judges should write their initials on the ballot with such material that it could not be easily erased? It was manifestly to secure the return to the judges of the same paper they gave to the elector. They had no right to look on the inside of the folded ballot, and therefore the only means of identification was that afforded by the initials. Without that mark the person offering to vote could impose another paper on the receiving judge and carry the official ballot away. And in furtherance of the same purpose the law imposed on the receiving judge the duty of examining the ballot when it was handed to him by the elector to see if the initials were on it, and forbade him depositing it in the box if it was not so marked." (underscoring ours.)

At l. c. 84, the court said:

"* * *The statute does not say that a ballot not so marked shall not be counted. It addresses itself to the officer and says to him, examine the ballot to see if it is properly indorsed and if it is not so, do not deposit it. This duty is to be performed in the presence of the elector; he has the right, and it is a right usually exercised, to stay and see his

ballot deposited, or, if it is not deposited, to know why.* * *"(underscoring ours.)

At 1. c. 85, the court said:

"* * *In the language of Blake v. C., in Grant V. McCallum, 12 Can. L. J. (N. S.), loc. cit. 114: 'It must also be borne in mind that if the court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day, may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and to have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him.'

* * * * *

"The cases in which this court has held that a failure on the part of the election officers to observe any of such duties, would result in depriving an elector of his right to have his vote counted are those in which the statute expressly so declared. (West v. Ross, supra; Ledbetter v. Hall, supra; Gumm v. Hubbard, 97 Mo. 311.)" (underscoring ours.)

From the above it is clear that the court considered the initialing of the ballots a duty of the election judges but did not consider their failure to perform this duty so material as to disfranchise a voter. Its ruling is summed up at 1. c. 82 as follows:

"We can not get rid of this provision of the statute by merely giving it a name, or classifying it, as mandatory or directory. If to say that it is mandatory means that unless its terms have been literally complied with the

elector is to be deprived of his franchise and the candidate of a vote otherwise lawful, then it is not mandatory, and if to say that it is directory means that it may with impunity be disregarded by the election officer, then it is not directory.* * *

Nehl v. Guion, supra, was followed and cited with approval in Gass v. Evans (1912) 149 S. W. 628, 244 Mo. 329, wherein the court said at l. c. 354:

* * * * *

"We reaffirm and stand by the doctrine of the Bowers and Nehl cases and overrule the McKay case. In doing so we are not to be taken as palliating or justifying a slovenly performance of official duty. There are remedies open and ample for non-performance of or misfeasance in official duties. So, if their official acts open a way for fraud and wrong to corrupt an election, it may be followed and corrected in a contest. We are protecting an honest voter, who, doing no wrong himself, performs his own duty as a citizen, casts an honest vote and is entitled to have it counted unless the law itself raises an impassable obstacle, as held in the Bowers and Nehl cases."

These cases are the latest expression of the Missouri courts on this question.

Section 11608, R. S. Mo. 1939, requires that the registration number be placed on all ballots. The case of Timmonds v. Kennish, 149 S. W. 652, 244 Mo. 318, stated that Section 5899, R. S. Mo. 1909, which preceded the present Section 11602, R. S. Mo. 1939, applied where there was no registration number to go on the ballot and Section 5905, R. S. Mo. 1909, which preceded the present Section 11608, R. S. Mo. 1939, applied where the statutes did not provide for a registration number. The case was dealing with a situation wherein there were specific statutes regarding registration in the City of St. Louis. The conclusion from the language of the Timmonds case would seem to be that where a registration number was provided it would not be necessary for the judges to

initial the ballot but that in a locality where there was no registration number provided the judges would have to initial them. If the statutes were the same now as they were at the time of the decision in *Timmonds v. Kennish*, supra, this, of course, would mean that, in a locality where a registration number was provided under Section 11603, R. S. Mo. 1939, that the judges would not have to initial ballots. However, we do not think that the *Timmonds* case is now applicable since Section 11602, R. S. Mo. 1939 was amended in 1921. (Laws, 1921, page 308.)

The old section stated that "no other writing shall be on the back of the ballot, except the number of the ballot voted". Thus, this section excluded, by its terms, the addition of the registration number and created a conflict between that statute and the statute which required a registration number to be placed on the ballot. This was the reason for the holding as regards these two sections in *Timmonds v. Kennish*, supra, the court in that case seeking to harmonize the two laws.

The 1921 amendment changed this section and left out the requirement that no other writing should be on the back of the ballot except the initials of the judges and the number of the ballot voted. The amendment was made after the *Timmonds* case was decided and that case was probably the reason for the change noted above.

Therefore, at the present time there is no conflict between Sections 11602 and 11603, R. S. Mo. 1939, and this leaves the requirement of Section 11602 that the judges initial the ballots applicable where there is a registration number as well as where there is not.

In summary, we think it is the duty of the election judges to initial all ballots, although, from the above cases, a failure to do so would not invalidate the ballot if it had been otherwise properly voted.

CONCLUSION

It is, therefore, the opinion of this department that it is necessary in a locality where there is registration of voters for the judges of each political party to initial the ballots in a general election.

Respectfully submitted,

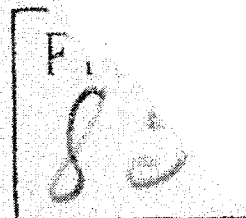
APPROVED:

J. E. TAYLOR
Attorney General

SMITH N. CROWE, JR.
Assistant Attorney General

TAXATION AND REVENUE: Right to exemption from taxation property belonging to German Saint Association.

January 13, 1946



Honorable George L. Stemmler
City Counselor
St. Louis, Missouri

Attention: Charles J. Dolan, Associate City Counselor

Dear Sir:

Reference is made to your letter requesting an official opinion of this office, reading, in part, as follows:

"Sometime ago this office rendered an opinion to the Assessor regarding a claim for exemption from taxes presented to the Assessor on behalf of the German St. Vincent Orphan Association. The attorney for the Association, Mr. E. V. P. Schneiderhahn, disputes the correctness of our ruling, basing his contention on an opinion rendered in the same case by Assistant Attorney General Crowder, dated July 24, 1925.

* * * * *

"The question submitted relates exclusively to the exemption claimed on behalf of the property referred to in Mr. Hoehn's letter of April 27, 1945. We would appreciate hearing from you at your convenience with regard to the foregoing question."

The letter received by your office from Mr. Hoehn under date of April 27, 1945, and referred to in your letter of inquiry, reads, in part, as follows:

"The German St. Vincent's Orphan Association acquired vacant property located in City Block 4414-W Lots 52 and 53 on March 15th, 1944 by Special Warranty deed from Viola Crowe dated February 14th, 1944 and recorded March 15, 1944, Daily No. 89.

"Said Association claims that under their charter this property is exempt from taxation. See Laws of 1851, page 457."

May we say that we have reviewed the opinion of the Office of the Attorney General of Missouri dated July 24, 1925, directed to the Honorable Oliver Senti, City Counselor, St. Louis, Missouri, and written by the Honorable George W. Crowder, Assistant Attorney General. We concur in the conclusion expressed therein, but inasmuch as the opinion does not consider certain other contentions which may be urged against the granting of the tax exemption, we believe it well to prepare a more exhaustive one.

The German Saint Vincent Association was chartered by a special act of the General Assembly, found Laws 1851, at page 457. The relevant portions thereof provide as follows:

"Sec. 1. Frederick Joseph Heitkamp, Bernan Degenhart, Joseph Degenhart, Frederick Hietkamp, John Frederick Mantel and Francis Beehler, their associates and successors, be and they are hereby ordained, constituted and declared to be, a body corporate and politic, by the name and style of 'The German Saint Vincent Association,' and by that name they may have continual succession, and shall be capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all courts and places whatsoever; shall have and enjoy, all necessary powers as an incorporated company, to procure by subscription, purchase, bequest or otherwise, real estate for the purposes of the association and not otherwise, and to hold the same free from all taxes in their corporate capacity; to rent, lease, sell, or otherwise dispose of the same, as the said association may deem proper, always saving and protecting private rights; to hold and enjoy in their corporate capacity, all the property, real, personal or mixed, which they now have, or hereafter may acquire, with the proviso, that the same be applicable solely to the objects and purposes, of the association; that they, and their successors may have a common seal, and may change, alter or break the same at their pleasure." (Emphasis ours.)

"Sec. 4. The corporation hereby created shall continue so long as it shall faithfully, and beneficially fulfill the objects of its creation, but the general assembly may alter or repeal this act whenever the association,

has failed to accomplish its object, or violated its charter."

During the period in Missouri history at which this charter was granted, many others of similar nature were granted creating corporations for educational and charitable purposes, and in some instances corporations organized for private gain. Most of such charters included tax exemption clauses substantially the same as the one found in the charter of The German Saint Vincent Association. The construction of these various tax exemption grants has resulted in considerable litigation. Under the provisions of the Constitutions of 1865, 1875 and 1945, the General Assembly has been deprived of its authority to grant to either individuals or corporations exemption from taxes, but this prohibition did not exist under the provisions of the Constitution of 1820, and the right of the General Assembly to make such grants prior to adoption of the Constitution of 1865 is unquestioned.

Reviewing the earlier cases involving the construction of tax exemption clauses contained in the charters of similar corporations, we note Washington University v. Rowse, 42 Mo. 508, and Home of the Friendless v. Rowse, 42 Mo. 361. These cases were parallel throughout their histories in both the state and federal courts, and for that reason are now being considered together, the only real distinction between the two corporations being that Washington University was chartered for educational purposes, whereas the Home of the Friendless was chartered for charitable purposes. Both charters included tax exemption clauses similar to that of the German Saint Vincent Association, and in order that this similarity may be noted, we quote a portion of the charters of the respective corporations mentioned.

The Washington University charter, found Adj. Sess. Acts 1853, page 290, provided as follows:

"1. Christopher Rhodes," etc., "and their associates and successors, are hereby constituted a body corporate and politic, by the name of The Eliot Seminary, and by that name shall have perpetual succession, and be capable of taking and holding, by gift, grant, devise, or otherwise, and conveying, leasing, and otherwise disposing of, any estate, real, personal, or mixed, annuities, endowments, franchises, and other hereditaments which may conduce to the support of said seminary or to the promotion of its objects. All property of said corporation shall be exempt from taxation; and the sixth, seventh, and eighth sections of the first article of the act concerning corpo-

rations, approved March 19, 1845, shall not apply to this corporation. * * *

In the Home of the Friendless charter, approved February 3, 1853, the first section contains the following:

"All property of said Corporation shall be exempt from taxation; and the 6th, 7th and 8th sections of the 1st article of the Act Concerning Corporations, approved March 19, 1845, shall not apply to this Corporation."
(Emphasis ours.)

It becomes immediately apparent that the tax exemptions granted both Washington University and the Home of the Friendless are substantially the same as that of the German Saint Vincent Association.

Suit was commenced by both Washington University and the Home of the Friendless seeking to enjoin the collection of taxes on property owned by them. Such taxes purportedly had been assessed and levied in accordance with authorization to do so granted by a general act of the General Assembly passed subsequent to the adoption of the Constitution of 1865. Judgments of the circuit court enjoining the collection of the taxes were reversed by the Supreme Court of Missouri, the court writing a complete opinion in the Washington University case, and deciding the Home of the Friendless case on the same principles but without opinion.

Thereupon, both cases were taken on writ of error to the Supreme Court of the United States. Jurisdiction had been placed for such action in the Supreme Court of the United States by reason of the injection of a federal constitutional question. Such question arose from the claims of the respective corporations that to permit the imposition of the taxes would result in the impairment of the obligations of an existing valid contract between the State of Missouri and each of such corporations whereby they were relieved from payment of taxes; thereby contravening the provisions of the Federal Constitution.

In the Supreme Court of the United States, the more exhaustive opinion was delivered in the Home of the Friendless case, the Washington University case being decided with but a very short opinion, the court saying no material difference existed in the two cases.

In each instance, the decision of the Supreme Court of Missouri was reversed and the cause ordered remanded to the lower court for disposition. We quote from *Home of the Friendless v. Rowse*, 75 U. S. (8 Wall.) 430, 19 L. Ed. 495:

"This is a writ of error to the Supreme Court of the State of Missouri. It appears that the plaintiff in error, a Corporation created by the Legislature of Missouri, commenced a suit on the equity side of the Circuit Court of St. Louis County, to restrain the defendant, who was Collector of the Revenue for the County, from collecting the taxes on two parcels of real estate of which it was the owner at the time of the assessment, on the ground that the taxes were illegally assessed, because all its property by its Act of Incorporation, was expressly exempted from taxation at all times. The defendant interposed a demurrer, which was overruled and the judgment on the demurrer made final. The cause was removed to the Supreme Court of the State, and resulted in the reversal of the judgment of the lower court and the dismissal of the bill of petition.

" * * * The important question raised by the record is: whether the State of Missouri contracted with the plaintiff in error not to tax its property. If he did so contract, it is undisputed that the assumed legislation, under the authority of which the property in controversy was taxed, impaired the obligation of this contract.

"The object for which the Home of the Friendless was incorporated was to enable those persons of the female sex, who were desirous of establishing a charitable institution in St. Louis for the relief of destitute and suffering females, to carry out their laudable undertaking.

* * * * *

"It is objected that there is no consideration stated in the Act for the release from taxation, which is claimed is necessary in

order to uphold the contract. But this is a mistaken view of the law on this subject.

"There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*, 4 Wheat. 519.

"It is contended that the rules of construction applicable to legislative contracts are more stringent than those which are applied to contracts between natural persons, and that, applying these rules to this contract, it cannot be sustained as a perpetual exemption from taxation.

"It is true that legislative contracts are to be construed most favorable to the State if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons. Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation,' are the words used in the Act of Incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was, undoubtedly, the purpose of the Legislature to grant to the Corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could, at its will, resume the power of taxation. * * * *

"The validity of this contract is questioned at the bar on the ground that the Legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that the State may, by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted. *New Jersey v. Wilson*, 7 Cranch, 164; * * * *

"It is proper to say that the present Constitution of Missouri prohibits the Legislature from entering into a contract which exempts the property of an individual or corporation from taxation; but when the charter in question was passed there was no constitutional restraint on the action of the Legislature in this regard.

"Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the Corporation from taxation, and that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement, to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

"The judgment of the Supreme Court of Missouri reversed, and the cause remanded to that court below, with directions to proceed in conformity with this opinion."

It therefrom appears that the granting of the charter by the General Assembly and its acceptance by the corporation did create a contract between the State of Missouri and the corporation, under the provisions of which perpetual exemption from taxation was granted. It further appears that no action taken by subsequent General Assemblies could impair the obligations

of such contract. We believe that the German Saint Vincent Association was placed in the same position by virtue of the charter granted it and the acceptance of such charter by the corporation.

Again, after the adoption of the Constitution of 1875, an effort was made to subject the property of Washington University to taxation on the theory that the adoption of such constitution destroyed the prior immunity of such corporation from exemption. On appeal to the Supreme Court of Missouri, in *Washington University v. Baumann*, 108 S. W. (2d) 403, 1. c. 412, the court held:

"In the instant case the University has a contractual charter with the state, and that contract under the decision of the United States Supreme Court in the *Washington University Case* cannot be impaired by subsequent legislation. It stands superior not only to our present taxing law but even to our Constitution, in so far as they purport to destroy the University's privileges and immunities thereunder, relied on for years by it and at least some of its benefactors, as the evidence shows. To do so would be to commit fraud. * * *"

The doctrine declared in the last cited case was reaffirmed in *Washington University v. Gorman*, 153 S. W. (2d) 35, 1. c. 39, wherein the court quoted that portion of the opinion in *Washington University v. Baumann*, set out above, and reaffirmed it as being the controlling principle to be applied to the case then under consideration.

From the foregoing, we are persuaded to the view that the tax exemption granted the German Saint Vincent Association is such as to permit it to occupy the same status with respect to exemption from taxation of its real property as that occupied by Washington University and the Home of the Friendless. We can see no material difference between a tax exemption providing that the association may acquire real estate and "hold the same free from all taxes" and the Washington University exemption, "all property of said corporation shall be exempt from taxation," and the Home of the Friendless exemption, "all property of said corporation shall be exempt from taxation," except that such tax exemption with respect to the German Saint Vincent Association is limited to real property and would not be extended to include property of other nature.

However, our principal reason for preparing this opinion is to give some consideration to another phase of the matter which has not been mentioned in any of the correspondence or previous opinions relative thereto. We refer particularly to the General Corporation Act of 1845, found Revised Statutes of Missouri, 1845, page 323, Chap. 34, Art. 1.

It will be noted that in both the charter of the Washington University and of the Home of the Friendless specific reference was made to this General Corporation Act and both charters were specifically withdrawn from the operation of its provisions. It may now be argued that inasmuch as similar provisions are not contained in the charter of the German Saint Vincent Association, a different doctrine should prevail in determining its present right to such tax exemption.

However, we believe that such contention could not be sustained. We direct your attention to Trustees of William Jewell College of Liberty v. Beavers, 171 S. W. (2d) 604, 1. c. 609:

"Defendant's motion for rehearing, as did its brief en Banc (also brief of amicus curiae), stresses the provision of the general corporation laws of 1845 (R.S. 1845, p. 232, Ch. 34, Art. 1, Sec. 7) making charters 'subject to alteration, suspension, and repeal, in the discretion of the legislature.' *Ston Hall College v. South Orange*, 242 U. S. 100, 37 S. Ct. 54, 61 L. Ed. 170, and *City of Covington v. Kentucky*, 173 U. S. 231, 19 S. Ct. 383, 43 L. Ed. 679, are cases cited as authority for the proposition that this statute became a part of the plaintiff's charter and contract, and was a reservation of the right to repeal its tax exemption. Citing also Missouri cases: *Watson Seminary v. Pike County Court*, 149 Mo. 57, 50 S. W. 880, 45 L.R.A. 675; *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312.

* * * * *

"However, even this contention would not change the result we have reached. Defendant assumes that this tax exemption was repealed by the adoption of the Constitutions of 1865 and 1875. However, this court held in *Scotland County v. Missouri*, Iowa &

Nebraska Ry. Co., 65 Mo. 123, that the provision of the 1865 Constitution prohibiting tax exemptions (Sec. 16, Art. 11) 'was evidently designed to be prospective and not retrospective in its operation, and it would be an unjust imputation on the convention which framed that Constitution to infer that they designed that section to operate upon existing rights.' This ruling was approved and followed in State ex rel. Dosenbach v. St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S. W. 811.

"In the Convent of Mercy case, this court held that the same thing was also true of the provisions of the Constitution of 1875, saying:

"We are unable to see why the constitution of 1875 should receive, as to these sections, a different construction from that of 1865. As to prospective legislation, they are both clear and specific, but in neither do we discover any intention that they should act retrospectively. * * *

"It would be violative of this almost universal canon of construction to hold that these general affirmative provisions should have a retroactive effect, and that they repeal this exemption, under the general language of the constitution in the section quoted.'

"This ruling as to the effect of the provisions of both Constitutions was again approved and followed in State ex rel. Morris v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S. W. 990. Furthermore, as we pointed out in the Divisional opinion, the Constitution of 1875 provided what is in effect a savings clause, Sec. 1, Art. 12, Mo. R.S.A., to preserve 'existing charters, or grants of special or exclusive privileges,' when at the time of its adoption 'the corporation was organized and the contemplated charter powers exercised.' Therefore, whatever may be the power of the state to repeal plaintiff's tax exemption under the reserva-

tion in the general corporation law of 1848, it did not do so by adopting the Constitutions of 1865 and 1875, or by general statutes enacted for the purpose of carrying out the provisions of those Constitutions."

We believe that similar reasoning would prevail with respect to the charter of the German Saint Vincent Association inasmuch as it was created by a special act of the General Assembly, as pointed out heretofore.

It might be further contended that inasmuch as the real property is perhaps not being directly used for the purposes of the association, it has become subject to taxation. We do not believe that determination of such a condition lies within the jurisdiction or authority of local taxing officers, as it is a matter which could only affect the right to continue corporate existence of the association and could only be raised by the State in a direct action seeking the dissolution of the corporation. We quote from *Washington University v. Baumann*, 108 U. S. (24) 403, 1. c. 409:

"Considered with its context, the statement in the opinion that it was not to be presumed the corporation would ever act in such a manner as to jeopardize its corporate rights, plainly implies the University's property will remain free from taxation so long as it commits no act ultra vires by the acquisition, holding, or use of property for some purpose other than the support of the educational establishments for which it was organized. This was more directly held in a similar tax exemption case, *St. Anna's Asylum v. New Orleans*, 105 U. S. 362, 365, 366, 26 L. Ed. 1128, where the same court said: 'Undoubtedly, if the corporation should acquire property not needed or used for carrying on the institution, it would be an act outside of the objects and purposes of the charter, and ultra vires.' And if a determination of that question be prerequisite to an ascertainment of the corporation's liability for taxes, the general rule is that it can be raised only by the state in a direct proceeding for that purpose. 51 C. J. sec. 8, p. 315, sec. 18, p. 322; *Blair v.*

Chicago, 201 U. S. 400, 450, 451, 26 S. Ct. 427, 50 L. Ed. 601; Pittsburgh, A. & M. R. R. Co. v. Stowe Tp., 252 Pa. 149, 161, 97 A. 197, 201; Kavanaugh v. St. Louis, 220 Mo. 496, 518, 119 S. W. 552, 553; State ex rel. Donnell v. Foster, 225 Mo. 171, 192, 193, 125 S. W. 184, 189; Estel v. Midgard Inv. Co. (Mo. App.) 46 S. W. (2d) 193, 193 (c)."

CONCLUSION

In the premises, we are of the opinion that the real property of the German Saint Vincent Association is exempt from the general taxing statutes under the provisions of its charter.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

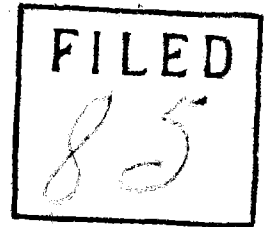
APPROVED:

J. E. TAYLOR
Attorney General

WFB:FR

MARRIAGES: Right of Probate or Circuit Court to order the issuance of marriage license to minors.

July 9, 1946



Mr. George L. Stemmler
City Counselor
234 City Hall
St. Louis, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter requesting an opinion of this department, which reads as follows:

"Mrs. Ruby Koelling, the Recorder of Deeds, has requested this Department to advise her as to the meaning of Section 3370 R. S. Mo., 1939.

"Her specific inquiry is whether the statute authorizes the Court to order a marriage license issued without the consent of the parents when the applicant is a minor over fifteen years of age.

"We informed her that the statute ought to receive a uniform construction throughout the State, and that she ought to be guided by the advice of the Attorney General.

"We would appreciate it if you will rule on the question and address your opinion to George L. Stemmler, City Counselor, 234 City Hall, or to Mrs. Koelling, whose office is also in the City Hall, and send a copy to Mr. Stemmler for our files in case the question comes up again."

Your specific question for opinion is whether or not the Probate or Circuit Court has the authority to order the Recorder of Deeds to issue a marriage license to minors be-

tween the ages of fifteen and eighteen for females, and fifteen and twenty-one for males. We direct your attention to Section 3370, R. S. Mo. 1939, which reads as follows:

"No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

It is a fundamental principle of statutory construction that if possible we must ascertain and give effect to the legislative intent. *Mo. Pac. RR. Co. v. Hellmich*, 12 Fed. (2d) 978; *State v. Naylor*, 40 S.W. (2d) 1070. In determining the legislative intent it is proper that we look to the legislative history of the act in question. *American Bridge Co. v. Smith*, 179 S.W. (2d) 12. The section in question was originally enacted in 1881 and reads as follows:

"No recorder shall issue a license authorizing the marriage of any male person under

the age of twenty-one years, or female under eighteen, except with the consent of his or her father, or if he is dead or incapable, or not residing with his family, or his or her mother, or guardian, as the case may be, if he or she have one, which consent, if not given at the time in person, shall be evidenced by a certificate in writing, subscribed thereto and duly attested. The recorder shall state in every license, whether the party applying for the same, one or either or both of them are of age, or whether either or both are minors, and if either party is a minor, the name of the father, mother or guardian consenting to such marriage."

Before the enactment of this act, under the common law infants were able to contract in marriage if the male was fourteen or over and the female was twelve or over. Although the state is not a party to marriage contracts, it is vitally interested in family relations. Believing the common law age to be too low, it enacted this act setting up restrictions on the marriage of minors, but still, the General Assembly did not set a minimum age, leaving that question to the parents. Then, in 1919, after parents had abused their privileges, the General Assembly again asserted the state's right to regulate marriage contracts and passed what is now Section 3370, supra. From an examination of this statute it is noted that they have set a minimum age of fifteen, but they have granted the circuit or probate court authority to order an issuance of a marriage license only under unusual conditions. We do not believe they intended to invade the family relation and go so far as to allow the courts to order the issuance of a license to applicants between the ages of twenty-one and fifteen, but rather, that this proviso would make this statute flexible and not cause any undue hardship should the occasion arise that for public policy it would be expedient for a person under the age of fifteen to become married.

The general rule of statutory construction relating to provisos is that they apply to the immediately preceding parts of a clause to which they are attached. The Supreme Court of Missouri in the case of *Brown v. Patterson*, 224 Mo. 639, states, at l. c. 658:

"* * * The purpose of a proviso is not to create new rights or make new law or to take away old rights existing under the law or to repeal a part of existing substantive law, but to restrict or restrain the preceding portion of the statute of which it forms a part. * * *"

Although like all general rules of statutory construction, the courts have applied many exceptions they have based the exceptions on their interpretation of the intention of the Legislature. For the reasons set out in the first part of this opinion, we believe the intention of the Legislature would further strengthen this general rule in its application to our problem. In applying the principle to Section 3370, supra, the proviso would be an exception to the first clause of the statute relating to persons under fifteen years of age and not to the part subsequent to the proviso, which relates to minor females between the ages of fifteen and eighteen and minor males between the ages of fifteen and twenty-one.

Conclusion

Therefore, it is the opinion of this department that Section 3370, R. S. Mo. 1939, does not authorize the probate or circuit court to order a marriage license issued without the consent of the father, mother or guardian, when the applicant is a minor over fifteen years of age.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

MOTOR VEHICLES: Minimum age required for drivers of common carriers under Section 5730, Laws of Missouri 1945, and Section 8447, R. S. Mo. 1939.

July 16, 1946



Mr. Minkle Statler, Supervisor
Drivers License Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of a letter from Mr. E. J. McKee, former Motor Vehicle Commissioner, requesting an opinion from this department in regard to the licensing of public and common carriers. We have been informed that you desire this opinion forwarded to you. The letter requesting the opinion reads as follows:

"It has come to the attention of this Department that Senate Bill #40 of the 63rd General Assembly conflicts with Section 8447, Revised Statutes of Missouri 1939.

"It is our desire to have an opinion from your department as to how these conflicting laws should be enforced."

Our interpretation of your question for opinion is whether or not Senate Bill No. 40 of the 63rd General Assembly repeals Section 8447, R. S. Mo. 1939, in its entirety or in part. Senate Bill No. 40 of the 63rd General Assembly, which is now Section 5730, Laws of Missouri 1945, and will so be referred to in the rest of this opinion, reads as follows:

"Section 1. That an act of the Sixty-first General Assembly of the State of Missouri entitled, 'An Act to repeal Section 5730 R. S. Mo. 1939, relating to Public Service Commission and to enact in lieu thereof a section to be known as Section 5730 relating to the same subject,' approved August 4, 1941 and found on pages 521 and 522, Laws of Missouri, 1941, be and the same is

hereby amended by striking out the following word in the second line of subsection (b) of said section to wit 'twenty-one' and by inserting in lieu thereof the following 'eighteen' so that said section when amended shall read as follows:

"Section 5730. The commission, in the exercise of the authority by this act vested in it, to license, supervise and regulate all motor carriers or contract haulers shall promulgate and mail or deliver to each holder of a certificate of convenience and necessity, interstate permit or contract hauler's permit hereunder, such safety rules and regulations as it may deem necessary to govern and control the operation of motor carriers or contract haulers over and along the public highways of this state, and the equipment to be used. Any such safety rules promulgated, in addition to any others deemed necessary by the commission, shall include the following:

"(a) Every motor vehicle and all parts thereof shall be maintained in a safe and sanitary condition at all times.

"(b) Every driver employed by motor carriers or contract haulers shall be at least eighteen years of age, of good moral character, and shall be fully competent to operate the motor vehicle under his charge.

"(c) Accidents arising from or in connection with the operation of motor carriers or contract haulers shall be reported to the commission in such detail and in such manner as the commission may require.

"(d) The commission shall require and every motor carrier or contract hauler

shall have attached to each unit or vehicle such distinctive marking as may be adopted by the commission.

"(e) No passenger carrying vehicle coming within the provisions of this act shall be operated at a speed in excess of fifty-five (55) miles per hour. No property carrying vehicle coming within the provisions of this act shall be operated at a speed in excess of forty (40) miles per hour.

"Section 2. By reason of the pressing need for the benefits provided by the provisions of this Act prior to 90 days after the adjournment of the 63rd General Assembly, an emergency is hereby declared to exist within the meaning of the Constitution, and this act shall become effective and be in force and effect from and after its passage and approval by the Governor."

Section 8447, R. S. Mo. 1939, reads as follows:

"No person who is under the age of twenty-one (21) years shall drive any motor vehicle while in use as a school bus for the transportation of pupils to or from school, nor any motor vehicle while in use as a public or common carrier of persons or property, nor in either event until he has been licensed as a chauffeur or as a registered operator."

Section 5730, R. S. Mo. 1939, as amended by the Laws of Missouri, 1941, p. 521, par. 1, contains the same provision as Section 5730, Laws of Missouri 1945, except the minimum age requirement of subsection (b) was changed from twenty-one to eighteen years. Therefore, our question of legislative intent will be confined, in this opinion, to only this change.

Section 5721, R. S. Mo. 1939, was repealed by House Bill No. 137 of the 63rd General Assembly and a new section was en-

acted in lieu thereof, to be known as Section 5721, Laws of Missouri, 1945. Said new section provides:

"The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used in transporting farm machinery, produce, supplies, household goods, or other articles or commodities from farm to farm; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this article shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This article shall not apply to trucks used in work for the state or any civil subdivision thereof."

The above article referred to is Article 8 of Chapter 35, which includes Section 5730, Laws of Missouri, 1945. So our question is again narrowed so that the ultimate discussion will be whether or not Section 5730, Laws of Missouri, 1945, repeals by implication Section 8447, supra, and allows a minimum age requirement of eighteen years for drivers of public or common carriers.

It is noted that in the title of Senate Bill No. 40 of the 63rd General Assembly Section 5730, Laws of Missouri, 1941, page 521, par. 1, was expressly repealed, but there is no mention of Section 8447, supra. In order for the bill to act as a repeal of this section, it is necessary that said repeal be implied. The fact that one section was expressly repealed and the other not even mentioned would seem to indicate that the General Assembly had no intention of repealing the latter. But, in order for one statute to repeal another it is not necessary that a repealing clause be contained therein. In the case of *Young v. Greene County*, 119 S.W. (2d) 369, 1. c. 374, the court states:

"* * * If two statutes deal with the same subject matter and are inconsistent with each other, so that both cannot be operative as to such subject matter, the later act will be regarded as a substitute for the earlier one and will operate as a repeal thereof, although it contains no express repealing clause. * * * * *

And, further, it is not necessary that a later statute repeal the earlier statute in its entirety. In the case of *State v. Taylor*, 18 S.W. (2d) 474, the court states that two statutes should be construed so that each may stand and be given effect, if possible, and the later statute should be construed to repeal a former only insofar as the two acts may be found to be in conflict.

Implied repeal has long been held in disfavor by the courts of our state. In *Graves v. Little Tarkio Drainage Dist. No. 1*, 134 S.W. (2d) 70, 1. c. 81, the court states:

"* * * 'Repeals by implication are not favored--in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent,

both must stand. These principles
of construction are well settled.'

*****"

Although the above rule of construction be true, the court,
in *Wentz v. Price Candy Co.*, 175 S.W. (2d) 852, 1. c. 857,
states:

"* * * The fundamental rule of stat-
utory construction is that courts
shall ascertain and give effect to
the intention of the legislature.

*****"

In determining this intent, we believe that we should
look at the surrounding circumstances at the time of the
passage of this bill. In the case of *Fischbach Brewing Co.*
v. City of St. Louis, 95 S.W. (2d) 335, 1. c. 338, the court
states:

"In determining the meaning and in-
tent of a statute it is proper to con-
sider the time of its enactment, the
surrounding facts and circumstances,
the purpose for which the law was en-
acted, the cause or necessity which
induced its enactment, the prior con-
dition of the law, the mischief sought
to be remedied, contemporaneous and
prior historical events which may have
influenced the enactment; in other
words, the judicial interpreters of
the law should put themselves as near
in the position of the makers of the
law as possible in order to more cor-
rectly ascertain their intent in its
enactment. *****"

At the time the bill was under consideration a large
part of our men between the ages of twenty-one and thirty
were serving their country in the various armed forces. Also,
many of our young men that were not in the armed forces were
working in newly created war industries. These large drains
on our manpower made it very difficult for employers to obtain
enough men to fill the jobs that they had open. We believe
that with this in mind the General Assembly attempted to allev-
iate the situation as it applied to the common carriers. In

order to do this they lowered the age of drivers from twenty-one to eighteen years. If their attempt is to be of any effect it will be necessary to construe Section 5730, Laws of Missouri, 1945, as repealing, or being an exception to, Section 8447, supra, at least in part. Another familiar rule of statutory construction is that the Legislature, in passing a law, did not intend to do a meaningless act. In the case of State ex rel. Frank W. McAllister, Attorney General, v. John W. Dunn, 277 Mo. 38, 1. c. 45, the court states:

"* * * That the Legislature intended to accomplish something is not an unreasonable conclusion. That the statute should be construed to effect this, if on its face it is open to two reasonable constructions, is settled law. * * *"

Further, as we have noted before, Section 5730, Laws of Missouri, 1945, is limited by Section 5721, supra. In other words, Section 5730, Laws of Missouri, 1945, applies only in part to public or common carriers, while Section 8447, supra, applies to all public or common carriers. This brings before us another fundamental rule of statutory construction, namely, that a later special statute operates as the qualification to an earlier general statute embodying the whole of the subject matter. In State v. Mangiaracina, et al., 125 S.W. (2d) 58, 1. c. 60, the court states:

"* * * "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one * * *." * * * * *

We believe it is very clear that these statutes as they affect common carriers are totally inconsistent. Each statute

Mr. Hinkle Statler

(8)

affects common carriers, but, as we have pointed out, Section 5730, Laws of Missouri, 1945, is limited in application by Section 5721, supra. Applying the above rules of statutory construction, and taking into consideration the surrounding circumstances as we have pointed them out, we are of the opinion that Section 5730, Laws of Missouri, 1945, is an exception to Section 8447, supra.

Conclusion

Therefore, it is the opinion of this department that the minimum age of drivers of public or common carriers is eighteen years, with the exception of drivers of school busses, who must be at least twenty-one years of age.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

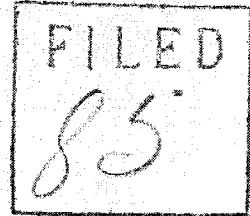
APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

COUNTY COURT: : Appointee to fill unexpired term of county court
OFFICERS, : is not entitled to increased compensation as pro-
SALARIES AND : vided in House Bill 778, passed by the 63rd Gen-
COMPENSATION : eral Assembly.

October 12, 1946.



Honorable Jackson C. Stanton,
Prosecuting Attorney
Miller County,
Tuscumbia, Missouri.

Dear Mr. Stanton:

This will acknowledge receipt of your recent request for an official opinion, which reads:

"The question has arisen in this county about the compensation of a member of the County Court.

"The Honorable George W. Robinson was appointed by his majesty, Governor Phil L. Donnelly, a member of the Miller County Court on the 23rd day of July, 1946.

"I do not have the law before me, but I am told that, effective July 1st, 1946 a law was passed that fixed the salaries and compensation of members of the County Court, elected or appointed after the effective date of such law at \$10 per diem and mileage. The present compensation for such members of the County Court in this county is \$5 per day and mileage for one trip each month.

"Question: What should be the rate of compensation for Judge Robinson, and covering what period?"

House Bill 778, enacted by the 63rd General Assembly on March 7, 1946, became effective on July 1, 1946. Said bill increased the compensation of members of the county court in third class counties to \$10.00 per day for the first five days in any month that they may be necessarily engaged in holding court; and \$5.00 per day for each additional day in any month that they may be necessarily engaged in holding court. It further provides for mileage, and specifically repeals Sec. 13402, R. S. No. 1939.

Section 1 of said Act reads:

"In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of

10-12-46

the first five days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by each of the respective county judges setting forth the number of miles necessarily traveled: provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

We wish to specifically call your attention to the last proviso under Sec. 1, supra, which we think is not ambiguous, but simply prohibits any increase in compensation during the present term of any county judge.

Section 8 of Article 14 of the Constitution of 1875 prohibited any increase in compensation of any state, county or municipal officer during his term of office.

Section 13 of Article 7 of the Constitution of 1945, now in effect, provides that the compensation of county, state and municipal officers shall not be increased during the term of office, which clearly indicates that even if House Bill 778, supra, should be construed so as to permit a county judge, appointed to fill an unexpired term of office, to receive the increased compensation provided in said Act, Section 13 of Article 7, supra, prohibits such increase during the term of office, which applies to the term and not the individual.

THEREFORE, it is the opinion of this department that a person appointed to the county court by the Governor to fill a vacancy in said court, is not entitled to increased compensation as provided in House Bill 778, supra, during the term of office for which his predecessor was elected.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney-General

APPROVED:

J. E. TAYLOR,
Attorney-General

ARH/LD

SHERIFFS: Sheriffs allowed fees only upon strict compliance
with statute.
FEES:

November 12, 1946



Mr. Ben B. Stewart
Acting Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Stewart:

Your letter of recent date, requesting an opinion of this office as to whether or not the Sheriff of Cole County is entitled to a \$3.00 fee for persons sentenced by the Circuit Court to the Penitentiary, under facts set out in your letter, reads, in part, as follows:

"We have a matter in question relative to granting receipts to Sheriffs to collect fees from the State Auditor, upon receipt of a commitment paper giving a convict an additional sentence after he has once been committed to the Penitentiary.

"When a convict escapes or commits another crime while in the Penitentiary, or if a charge is pending against him after he has been committed and is a case to be tried in the Cole County Circuit Court, we receive instructions by telephone to produce such a convict in Court. An Officer from this institution delivers the convict to Court and returns him after the Court proceedings. If the convict is convicted and given another sentence, the Sheriff of Cole County delivers the new commitment paper

and requests a receipt to collect his fees.

"Should we grant a receipt in such a case? * * * * *

Your question appears in the first part of your letter, and, therefore, the last two paragraphs are omitted.

Section 13413, R. S. No. 1939, in part, reads as follows:

"* * * For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, * * * * * and before any claim for taking convicts to the penitentiary is allowed, the sheriff, or other officer conveying such convict, shall file with the state auditor an itemized statement of his account, in which he shall give the name of each convict conveyed and the name of each guard actually employed, with the number of miles necessarily traveled and the number of days required, which in no case shall exceed three days, and which account shall be signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delivered at the penitentiary and were accompanied by each of the officers and guards named in the account. * * * * *

This section relates to fees of sheriffs for their services in criminal cases. In that part quoted it will be noticed that such fee is allowed only for the time actually and necessarily employed in traveling to the penitentiary.

It will be further noted that in the above section the account for such services shall be signed and sworn to by such officer and accompanied by a certificate from the warden of the penitentiary, or his deputy, that such convicts have been delivered to the penitentiary and were accompanied by each of the officers and guards named in the account. It would not be proper for such an affidavit referred to above to be made in the event such officer was not actually employed in taking convicts to the penitentiary.

Section 13415, R. S. Mo. 1939, provides:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

In the case of Nodaway County v. Kidder, 129 S.W. (2d) 857, the court, at l. c. 860, said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W.

532, 534; State ex rel. Linn County v.
Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams
v. Chariton County, 85 Mo. 645."
(Emphasis ours.)

The law seems to be well settled that a public officer claiming compensation for official duties must point out the statute authorizing such payment, and, in order for the officer to be entitled to such fee, the statute must be strictly construed.

Therefore, if the Sheriff of Cole County is not actually employed and does not actually travel in taking a convict to the penitentiary under commitment of sentence, but such duty is performed by a guard of that institution, then the Sheriff is not entitled to compensation.

CONCLUSION

Therefore, it is the opinion of this department that if the Sheriff does not comply with the statute by taking the convict on a commitment of sentence to the penitentiary, after conviction, he is not entitled to a fee.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

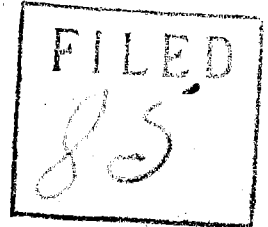
APPROVED:

J. E. TAYLOR
Attorney General

GPW:CP

MOTOR VEHICLES: Liabilities of the Motor Vehicle Unit of the
Department of Revenue under House Bill 317.

December 12, 1946



12/28

Mr. Rinkle Statler
Supervisor of Motor Vehicle Unit
Department of Revenue
Jefferson City, Missouri

Dear Mr. Statler:

We are in receipt of your letter of September 26, 1946, in which you request an opinion from this department. Your letter reads as follows:

"I would very much appreciate an opinion from you with regard to the liabilities and responsibilities of this Department under House Bill No. 317, the Financial Responsibility Act."

House Bill 317 sets out certain duties and responsibilities of the Commissioner of Motor Vehicles. For the most part these duties are directed to the general operation of the Motor Vehicle Unit in regard to requiring motor vehicle owners and insurance companies to comply with the Act.

However, there are several sections of the Act which require the Commissioner to act in a certain manner with respect to the individual motor vehicle owners. These sections are the ones we are interested in here.

Section 4 (b) provides that this Act shall not apply to motor vehicles owned by the United States, the State of Missouri or any political subdivision of this state, nor shall this Act apply to any common carrier or contract carrier whose operations are subject to the jurisdiction of and are regulated by the Interstate Commerce Commission or the Public Service Commission of Missouri. Should the Commissioner apply this Act to these named individuals he would be exceeding his authority.

Section 7 (a) provides that the Commissioner cannot suspend, or if suspended shall restore a license, registration or a non-resident's operating privilege following non-payment of a judgment when the judgment debtor gives proof of financial responsibility and obtains an order from the trial court in which such judgment was rendered permitting the payment of such judgment in installments. Should the Commissioner suspend a license or refuse to restore a license contrary to this section he will be exceeding his authority.

Section 28 provides that the Commissioner shall cancel any bond or return any certificate of insurance, or the Commissioner shall direct and the State Treasurer shall return to the person entitled thereto any moneys or securities deposited pursuant to this Act as proof of financial responsibility or waive the requirement of filing proof of financial responsibility in four instances as set out by the Act. If the Commissioner should refuse to comply with this provision he will be failing to exercise his duty under the Act.

Section 35 provides that this Act shall not have a retroactive effect and shall not apply to any judgment or cause of action arising out of an accident occurring prior to the effective date of this Act. If the Commissioner should apply this Act retroactively he will be exceeding his authority.

If the Commissioner exceeds his authority or fails to perform certain duties contrary to any of the preceding sections, the Commissioner, or his agents acting for him, will be liable to the party injured by such negligence or misfeasance.

Section 14 of Senate Bill 297 permits the Collector of Revenue to "deputize any officer or employee of any department, institution or agency of the state, subject to the approval of the head of such department, institution or agency, * *" It then provides that "The state collector of revenue may require a surety bond from any person so deputized in such amount and upon such conditions as he may deem necessary, with sureties to be approved by him. * *" Since the Motor Vehicle Unit is under the Collector of Revenue, a division of the Revenue Department, the Commissioner or his agents may be required to furnish a surety bond as required by this bill.

If any person is injured or damaged by the Commissioner or his agents because of their negligence or misfeasance, action should be brought against the Commissioner or his agents in their

individual capacity, as there is no right to proceed against the state or an agency thereof in the absence of a provision permitting such action. This rule is set out in Bush vs. State Highway Commission of Missouri, 46 S. W. (2d) 854, 1. c. 857:

"The rule is well settled that the state is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment. * *

"The exemption of the state from liability for the torts of its officers and agents does not depend upon its immunity from action without its consent, but rests upon grounds of public policy that no obligation arises therefrom. * * *

It hardly seems necessary to cite authority to the effect that the Motor Vehicle Unit as a part of the State Revenue Department is a state agency, but the Bush case, supra, at page 858, says this about the State Highway Commission, an analogous situation:

"Let us consider, therefore, in what manner the state highway commission should be classified. It was created * * * * * by legislative enactment, and clothed with powers therein defined, through the appointment of the Governor, under all recognized rules of construction it is, when properly classified, a subordinate branch of the executive department. * * *

Extending this proposition further, the court in State v. Riggs, 47 S. W. (2d) 178, 1. c. 180, makes this observation:

"We hold * * * that the state highway commission, being an agent of the state, is not liable for damages in torts."

However, if the Commissioner or his agents are bonded as authorized by Senate Bill 297, the sureties may be required

to satisfy any judgment obtained. Section 3242, R. S. Mo. 1939, specifically provides:

"Persons injured by the neglect or misfeasance of any officer may proceed against such principal or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

In the case of State v. Collins, 172 S. W. (2d) 284, 1. c. 289, the court makes the following observation in regard to the liability of sureties of public officials:

"This statute creates no new cause of action against either the officer or his sureties for his neglect or misfeasance, but merely provides a summary remedy against the sureties in any case where the officer is liable for an act of neglect or misfeasance which amounts to a breach of the condition of the bond. In other words, whenever the facts are such as to impose liability upon the officer, the person injured may proceed against both him and his sureties (State ex rel. v. Roth, 330 Mo. 105, 49 S.W. 2d 109, which must mean, we think, that whenever the facts are such as to impose liability upon two or more officers jointly for a single tort, the person injured may proceed against all the officers jointly, and at the same time join their respective sureties, each to answer for the default of his particular principal, so long as the maximum amount to be recovered is within the penalty of each individual bond. Notwithstanding the liability of his co-defendants, each officer in such a case is liable for the entire injury, so that a particular surety's undertaking is in no sense enlarged or affected by a rule of procedure which permits the person injured to bring in the sureties of each

individual officer in an action against two or more officers jointly for the redress of a single wrong."

Conclusion

Therefore, it is the opinion of this department that the Department of Revenue and the Motor Vehicle Unit, as a division of that department, are not liable for negligence or misfeasance in regard to the duties and responsibilities to individuals as set out under House Bill 317, but that the Commissioner of Motor Vehicles and his agents are individually subject to liability under this Act; but further, that the sureties indemnifying these agents may be joined in an action or proceeded against separately for any judgment to be recovered because of said negligence or misfeasance.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

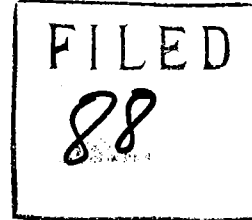
APPROVED:

J. E. TAYLOR
Attorney General

DD:EG

LEGISLATURE: Bill must be passed by majority of members elected even though there is a subsequent vacancy in the membership.

April 10, 1946



Honorable C. J. Tindel
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Will you please render an opinion on the constitutional requirement of passing a bill by 'a majority of members elected.' You may be familiar with the question which arose only a few days ago in regard to the number now necessary to pass a bill, since there was one vacancy which had been declared by the House, and the Governor notified, leaving 149 members in the House. Under these circumstances, what would be a majority of members elected?"

Section 27, Article III of the Constitution of Missouri, 1945, provides in part, as follows:

"* * * nor shall a bill be finally passed, unless a vote by yeas and nays be taken and a majority of the members elected to each house be recorded as voting favorably."

(Underscoring ours.)

The question presented by your request is, in view of the fact that there were one hundred and fifty members elected to the House of Representatives of the 62nd General Assembly, and since such election,

April 10, 1946

one vacancy has been declared by the House, does the above constitutional provision require a vote of a majority of the one hundred and fifty original members, or will a majority of the one hundred and forty nine present members suffice.

The above Section of the Constitution has been held to be mandatory. State ex rel. vs. Mead, 71 Mo. 266. There are no cases in Missouri directly passing upon this question in so far as they relate to this Section.

In State ex rel. McCaffery et al. vs. Mason 155 Mo. 486, the Court had before it a bill which was passed by a vote of seventy-five members, with fifty-three votes in opposition thereto, three members absent, four members absent with leave, and four members reported sick. The Court held, l.c. 503:

"*** We will take judicial notice that the House of Representatives is composed of 140 members; this being the case, it is obvious that House bill No. 760, the name by which the bill was known and identified, received the requisite constitutional majority."

It will be noted in the above case that there were only one hundred and thirty-nine members accounted for in the computation of the vote upon the bill in question, while the Court took judicial notice that there were one hundred and forty members of the Legislature. However, since there is no showing as to whether the other member had resigned, or that there was a vacancy in the membership of the House because of some other contingency, this case is very little authority in deciding the instant question.

In O'Dwyer vs. Monett, 123 Mo. App. 184, 100 S.W. 670, the St. Louis Court of Appeals had before it the legality of an ordinance which had been passed by a three to one vote, there being eight members elected to the city council. There was a statute which provided that: "'No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor.'" The Court held that the ordinance

April 10, 1946

did not receive the votes of the majority elected, and had failed to pass.

It may be well to note the case of State vs. McBride, 4 Mo. 303. The facts and question involved in that case as given by the case are as follows, l.c. 308:

"The first objection of the defendant's counsel is, that this amendment did not pass the senate by a majority of two thirds of that house. The senate then consisted of twenty-four members, and it appears that seven voted against, and fifteen for it. The question to be solved is, what is the meaning of the word house, as used in the constitution; does it mean all the members elected, or does it mean any number sufficient to constitute a quorum?"

The Court held that: "The most common meaning of the word then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the senate having voted for this amendment, and seven only against it, two being absent, it was passed by the required number of votes.

The above case holds that when the word "house" is used that only a quorum of the members is necessary, but recognizes the fact that if the words "elected to the house" had been used a different holding would have resulted.

The Courts of foreign jurisdictions which have passed upon this question are uniform in their decisions. They followed the rule laid down in 37 Am. Jur. 674, which states: "Where a statute provides that the vote of a certain number of members elected to the common council shall be necessary to take action of a certain character, the fact that there are vacancies in office, however occurring, does not diminish the number of votes necessary to take such action."

The Supreme Court of Minnesota in State ex rel. Peterson, vs. Hoppe, 194 Minn. 186, 260 N.W. 215, l.c. 217, said:

April 10, 1946

"* * * it seems to be clear that where the requirement is that a majority or other proportion of 'the members elected' is required there must be such affirmative vote as will satisfy the requirement of all who were elected to that particular body. This rule is illustrated in *San Francisco v. Hazen*, 5 Cal. 169 (175). It was there held that because the requirement was an affirmative vote of 'all the members elected,' there being one vacancy, the vacant office must also be considered in determining the total number of members as and when elected. * * * ".

The identical question was presented to the Court in *Wood vs. Gordon*, 58 W. Va. 321, 52 S.E. 261, and that Court ruled as follows: (l.c. 262)

"The rule is well established that in the construction of statutes effect must be given as far as possible to every part thereof. Evidently the Legislature had some object in providing that a vacancy should be filled 'by a majority vote of all the members elected.' The number of members elected to said council was 12, of which 7 are required for a majority. If a majority of a quorum, or of the number then constituting the council after one or more had died or resigned, had been intended, the Legislature would have so provided by saying that a majority of the council as then constituted, or a majority of a quorum, as might be intended, should fill the vacancy. *Pollasky v. Schmid*, 128 Mich. 699, 87 N.W. 1030, 55 L.R.A. 614, 92 Am. St. Rep. 560, is a case exactly in point, where the Supreme

Court of Michigan holds that 'the number of votes necessary to pass an ordinance over a veto, under a statute providing that it shall be two-thirds of all the members elected to the council, must be based on the total number elected, although at the time of the vote one member has died and one resigned.' And in *Pimental v. San Francisco*, 21 Cal. 351, the act provided that no ordinance should be passed, 'unless by a majority of all the members elected to each board.' The board of assistant aldermen was composed of eight members, and one of the eight had resigned, and four of the seven remaining had voted for the ordinance, and the court held that 'the ordinance in question, therefore, not having received the vote of a majority of all the members elected, was never passed. It was in fact rejected, as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes an absolute nullity.' See, also, *McCracken v. San Francisco*, 16 Cal. 591; *San Francisco v. Hazen*, 5 Cal. 169."

In view of the above authorities, it will be seen that, where a constitutional provision provides that a bill must be passed by a majority vote of the members elected, that it means a majority vote of all members that have been elected to the body, and a subsequent vacancy does not, in any way, affect the number that is required for the passage of such a bill.

CONCLUSION.

It is, therefore, the opinion of this Department that, under Section 27, Article III of the Constitution of Missouri, 1945, that a bill to be finally passed by the Legislature must be voted upon favorably by a majority of the members elected to each house. A subsequent vacancy

Honorable C. J. Tindel

-6-

April 10, 1946

in either house does not change the number of votes necessary to constitute the majority. There were one hundred and fifty members elected to the House of Representatives of the 62nd General Assembly, and, therefore, it would require a favorable vote of seventy-six members in order for a bill to be passed by such house. The fact there has been a vacancy declared in the house does not, in any way, affect such requirement.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

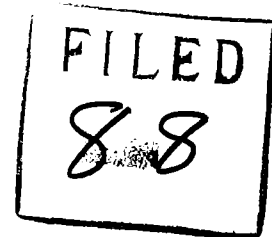
APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

TAXATION: Non-profit cemeteries' income from money loaned is taxable.

May 10, 1946



Honorable Cecil T. Taylor
House of Representatives
Jefferson City, Missouri

Dear Mr. Taylor:

This Department is in receipt of your request for an official opinion, which reads as follows:

"I am enclosing a letter received from the treasurer of a cemetery association in my County.

"These people would like to know, at your earliest convenience, whether or not this money that they have in the treasury can be loaned on real estate and the yield be non-taxable under the new constitution and the intangible law recently passed and set up in House Bill 868. Of course this money will go back into the cemetery fund which, as they state, is a non-profit organization. I would appreciate it if you will mail this ruling directly to me."

Section 6, Article X of the Constitution of Missouri, 1945, provides, in part, as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; * * *".

House Bill #471, passed by the 63rd General Assembly, and approved by the Governor, provides, in part,

May 10, 1946

as follows:

"The following subjects shall be
exempt from taxation for state,
county or local purposes: * * *
* * * * *
Fourth, non-profit cemeteries;
* * *."

The identical question presented in your request was before the Supreme Court of Missouri in State ex rel. Mount Mora Cemetery Association vs. Casey, 210 Mo. 235. Under the facts in that case, taxes had been assessed "against the personal property of the association, amounting in value to at least \$120,000, as found by the assessor of the city of St. Joseph, which has been invested and used by the association as its capital, and not for cemetery purposes."

The court, through Judge Burgess, held:

"It is quite clear that, under section 6 of article 10 of the Constitution, and section 9 of relator's charter, all of the land held by it for cemetery purposes is exempt from taxation for general purposes, but does it necessarily follow that its personal property and moneys on hand acquired from the sale of lots are also exempt from taxation? As a rule, all property is subject to taxation, and, therefore, laws exempting property from taxation are to be strictly construed, and the right of exemption established beyond a reasonable doubt. (Fitterer v. Crawford, 157 Mo. 51). An exemption from taxation exists only where it is expressed in explicit terms, and it cannot be extended beyond the plain meaning of these limits. (State v. Wilson, 52 Md. 638.)

May 10, 1946

"In Rosedale Cemetery Association v. Linden Township, 63 Atl. 904, it is held, under 'an act to authorize the incorporation of rural cemetery associations, and regulate cemeteries,' which provides that 'the cemetery lands and property of any association formed pursuant to this act or otherwise incorporated, as well as bonds and mortgages given to secure the purchase money of such cemetery lands, shall be exempt from all public taxes,' that the personal property of such cemetery associations, consisting of horses, hearses, carriages, agricultural implements, tools, and other articles used exclusively in and about their cemeteries and for burials in their cemeteries, are subject to taxation. The court said:

'The prosecutors insist that the word "property," as used in the eighth section supra, means personal property. All exemptions from general taxation are to be considered strictly; the resolution, in case of doubt, being in favor of the rule which subjects all property to a just share of the public burdens. * * * * *

It is in accordance with the common wish of mankind that the places where the dead are buried should be protected and preserved against the interference of possible sales for unpaid taxes, or under execution for debts, and be kept free from all molestation or desecration. These legislative exemptions of cemetery property are the expression of that wish. But it is not perceived how that wish is made effectual by exemption from taxation property not used for burial places that has no associations connected with it, and may be disposed of by the association

Honorable Cecil T. Taylor -4-

May 10, 1946

at any time, to any person for
any purpose. * * * * *

In view of the above case, and for the reasons
advanced therein, it is believed that income from money
loaned by a non-profit cemetery is taxable.

CONCLUSION.

It is, therefore, the opinion of this Depart-
ment that income from money loaned by a non-profit
cemetery is not exempt from taxation under Section 6,
Article X of the Constitution of Missouri, 1945, and
House Bill #471.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

TAXATION:

The provisions of House Committee Substitute for House Bill 784, passed by the 63rd General

ROADS AND BRIDGES: Assembly and approved by the Governor, does not take away from the special road district the money now in the treasury of such road district, and require it to be paid into the county treasury.

May 17, 1946

5/17
FILED
88

Honorable Cecil T. Taylor
House of Representatives
State Capitol Building
Jefferson City, Missouri

Dear Mr. Taylor:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this department, as follows:

"May I have your official opinion on the following question:

"Does House Bill No. 784, recently enacted by the Legislature, take away from special road districts the money now in the treasury of such road districts and require it to be paid into the county treasury?"

Section 8527, page 2, of House Committee Substitute for House Bill 784, provides that the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, "in their discretion may levy an additional tax". Section 8529, page 3, of House Committee Substitute for House Bill 784, provides for the election for the purpose of voting the additional tax levy. Section 8531, page 4, of House Committee Substitute for House Bill 784, provides that if a majority of the qualified voters voting at such election shall have voted for such additional tax, it shall be the duty of the county court to make the levy.

From the above provisions of House Committee Substitute for House Bill 784, it is clear that the bill provides for a future tax. None of the provisions of the bill refer to any tax other than this special additional tax which will have to be voted upon by the people and levied by the county court before any money could be collected under the provisions of this bill.

Section 8527, page 2, lines eleven to twenty-two, provides as follows:

"* * * other purpose whatever; provided,
however, that all that part or portion of

said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road * * *." (Underscoring ours)

In line twelve of Section 8527, on page 2 of the bill the words "said tax" appear. The "said tax" could, we think, refer to no other tax except the additional tax provided for in the prior portion of Section 8527. The proviso, above quoted, requires that the additional tax, provided for in this section, shall be paid into the county treasury. Since the provision for paying the tax into the county treasury is applicable only to the "said tax", and the "said tax" refers to the special additional levy provided for in House Committee Substitute for House Bill 784, which tax could not be collected until it was voted and levied under the provisions of the bill, we are of the opinion that House Committee Substitute for House Bill 784 does not affect any money which has been collected by reason of a former tax levy.

CONCLUSION

It is, therefore, the opinion of this department that House Committee Substitute for House Bill 784, does not take away from the special road district the money now in the treasury of such road district, and require it to be paid into the county treasury.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

GENERAL ASSEMBLY:
LEGISLATOR:

Representative employed by Director of Revenue on a per diem and mileage basis vacates his office as Representative.

FILED

88

October 11, 1946

10-15

Honorable Cecil T. Taylor
County Representative
Shelbyville, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an opinion of this department, and reading as follows:

"I would like to have your official opinion as to whether or not the Director of Revenue of Missouri can hire or employ a county representative in the General Assembly on a per diem and mileage basis to act as appraiser for the State of Missouri for the purpose of determining the amount of State inheritance tax due the State."

Article III, Section 12, of the Constitution provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator

or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term.
* * *

It is clear that anyone who is hired by the Director of Revenue of the state, and who receives pay or compensation from the State of Missouri, is either an officer or an employee of the state.

Article XIV, Section 13, of the Constitution of 1875 provided as follows:

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

In the case of State ex inf. Norman v. Ellis, 28 S. W. (2d) 363, this provision was held to be self-enforcing. The Supreme Court of Missouri said, 1. c. 365-366:

"The general rule is thus stated in 12 C. J. p. 729:

"It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed."

"And further, page 730:

"A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will."

* * * * *

"* * * 'Indeed, the clause under discussion merely expresses a status which will instantly result from the election required to be held. Statutory language would be impotent to add aught to the Constitution's expression of this resulting status, and so the clause is self-executing. It is a provision complete in itself, and needs no legislation to put it in force.' That language aptly applies to this case.

"Section 13 provides that any official violating its provision, '* * * shall thereby forfeit his * * * office employment.'"

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477."

Since it is provided in Section 12 of Article III of the present Constitution that the office of a senator or representative who accepts any office or employment under this state shall thereby be vacated, and he shall thereafter perform no duty and receive no salary as senator or representative, the holding in the case of State ex inf. v. Ellis, cited above, is applicable. A status results when a senator or representative does accept any office or employment under this state, and the section must be held self-enforcing. The fact that the employment may be only occasional would not affect this status, as the office is vacated immediately upon the acceptance of an office or employment under this state.

CONCLUSION

It is the conclusion of this department that a representative who is employed by the Director of Revenue of

Honorable Cecil T. Taylor - 4

Missouri and paid on a per diem and mileage basis vacates his office immediately upon acceptance of such office or employment.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:MR

BLIND PENSION: In Re: Board of Managers of School for the Blind
unauthorized to pay expenses of teachers
for travel to School for Instruction.

April 17, 1946

FILED

89

Missouri School for the Blind
3815 Magnolia
St. Louis, Missouri

Attention: Mr. Robert H. Thompson, Superintendent

Gentlemen:

This will acknowledge receipt of your recent request for an opinion of this department. For sake of brevity we are restating your request. You state that the Board of Managers of the Missouri School for the Blind consider it highly essential that some twelve teachers, employed by said school, attend this summer, the American Association of Instructors of the Blind Meeting in Watertown, Massachusetts. That since the salaries of said teachers are much lower in comparison with the average salary of teachers similarly employed in the nation, said Board does not feel the teachers should be asked to bear the cost of this trip. You estimate that the cost per capita for the trip will amount to about seventy-five dollars (\$75.00) per teacher and you inquire if the Missouri School for the Blind can legally pay said costs out of its "operation fund" appropriated by the General Assembly for travel.

One of the cardinal rules of statutory construction is to determine the legislative intent. (See Artophone Corporation v. Coale, 133 S. W. (2d) 343, 345 Mo. 344.)

Said Board of Managers, being merely a creature of statute, is vested only with such power as may be granted by statute and the necessary implied powers to carry out those powers expressly granted. In Morris v. Farr, 114 S. W. (2d) 962, 1.c. 964, 342 Mo. 179, the court, in holding that a County Court being a creature of statute, has only such powers as are granted by statute and when said court exceeds such authority such acts are void, said:

"(3) In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not

the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

Also in State v. Wymore, 132 S. W. (2d) 979, l.c. 987, 988, 345 Mo. 169, the court said:

"* * *In this situation the rule is stated as follows:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes.' 46 C.J. Sec. 301, p. 1035.

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515."

Therefore, unless the statutes authorize said Board of Managers of said school to send such teachers to this meeting for instruction, in order to better qualify them to teach, no appropriation can be used to defray such expense. This is true for the reason it is well established that the General Assembly cannot legislate by an appropriation act. In State v. Thompson, 289 S. W. 338, l.c. 341, 316 Mo. 272, the Court said:

"* * *That the Legislature has the right

by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not.

"As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403, as well as the following cases from other states: State ex rel. v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Com v. Gregg, 161 Pa. 582, 29 A. 297.

"Our Constitution (section 28, art. 4) is the one certain safeguard against such distracting possibilities and should be strictly followed.* * *"

An examination of the statutes disclose that under Section 10845, R. S. Mo. 1939, the Missouri School for the Blind is established as an educational institution for the State of Missouri. That under Section 10846, R. S. Mo. 1939, it provides for the creation of a Board of Managers to govern the school, said Board to be appointed by the Governor with the consent of the Senate. Under Section 10847, R. S. Mo. 1939, it authorizes said Board of Managers to elect a superintendent, teachers and officers for said school for the Blind, fix their term of office and fix the amount of compensation for services rendered. Furthermore Section 10864, R. S. Mo. 1939, vests in said Board of Managers the care and control of all property owned by said school and also vests the title in said property in said Board of Managers. Section 10864, supra, further provides that said Board of Managers shall not dispose of any real estate belonging to the school without an act of the Legislature.

We are unable to find any statute giving said Board of Managers express authority to incur the expense contemplated in your

request. There is no question but that such instruction would be highly beneficial, but, under the foregoing statutory provisions creating said school, vesting certain authority in the Board of Managers, we think it was not the intention of the Legislature that state funds should be expended by said Board of Managers for the purpose of training teachers employed by said Missouri School for the Blind. Said Board has authority to employ qualified teachers, also authority to fix their qualifications for employment and are not limited in any manner as to the amount of compensation they shall pay the teachers other than by the appropriation act, but certainly said Board has no authority to pay for such expenses in order that the teachers can better qualify for the position they now hold. If that was the Legislative intent it would have been an easy matter to have included such provision in clear and convincing terms in the statute.

In view of the fact that the Board of Managers are not authorized, under the statute, to send these teachers to this conference we consider it unnecessary to construe the appropriation to said School for the Blind as found in House Bill 361, which is somewhat ambiguous as to the provision relative to travel.

CONCLUSION

Therefore, it is the opinion of this department that the Board of Managers of the Missouri School for the Blind, being a creature of statute and not being vested with such authority to send teachers, employed by said school to said meeting for instruction, that such expense cannot be incurred by said Board and paid out of appropriation under "OPERATION", as contained in House Bill 361, passed by the 63rd General Assembly.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARR:mw

TAXATION AND REVENUE: Real property owned by religious organization not exempt from taxation when not used exclusively for religious purposes.

FILED NO. 89

October 17, 1946



Honorable William S. Thompson
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Will you please give me your opinion as to whether or not certain church property hereinafter described is subject to assessment for taxation purposes.

"The facts are as follows: the Methodist Church of Mercer, Missouri, disbanded their organization as such some years ago. At that time the Church owned the church building and a parsonage. Later the church building was sold and the parsonage was rented and the rent money for the parsonage was turned over to the Epworth Church, which is a Methodist Church out in the country from Mercer. Five years back taxes are now due on the parsonage and the parsonage is advertised to sell for taxes.

"In your opinion would this sale of the parsonage for taxes be a legal sale?"

Although you have not specifically so stated it to be a fact, we have in this opinion assumed that all of the assessments upon which the taxes have been levied and which are now delinquent were made subsequent to the time the parsonage was converted to income-producing rental property. We have also assumed that there is no question as to the regularity of the assessments and the publication of notice of sale, and that

all statutory requisites have been met by the various officials and other taxing authorities.

Section 6 of Article X of the Constitution of 1875 read as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law." (Emphasis ours.)

Pursuant to the constitutional authority embodied in the provision quoted, Section 10937, R. S. No. 1939, was in effect during the period of time involved in the assessments now under consideration. This section reads, in part, as follows:

"The following subjects are exempt from taxation: * * * sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, * * * shall be exempted from taxation for state, county or local purposes." (Emphasis ours.)

The question, then, is whether or not the conversion of the parsonage to income-producing rental property had the effect of destroying the exclusive use of such property for religious purposes. If this action had such effect, then, in accordance with the terms of the exempting constitutional and statutory provisions, the exemption no longer extended to such property.

We believe that the opinion in State ex rel. v. Y.M.C.A., 259 Mo. 233, is decisive of the instant matter. The St. Louis Y.M.C.A. was a religious and educational association. In such capacity it owned certain real property located in the City of St. Louis, of which some fifteen per cent of the total area had been converted to income-producing rental property. The contention was made by the religious and educational organization that, in view of the fact that such income as was produced under the rental agreement was used exclusively for the purposes of the organization, its real property had not lost its exemption from taxation. A decree of the circuit court had upheld the right of the state and city to levy and collect general real estate taxes upon the real property in the circumstances outlined, and the Y.M.C.A. had appealed.

In affirming the decree of the circuit court and holding that the property was subject to taxation, the court said, l. c. 237:

"Two of the cases cited by respondent (Taylor v. Labeaume, 17 Mo. 338; and Fitterer v. Crawford, 157 Mo. 51) furnish very strong support for the decree of the circuit court. The ruling in the Fitterer case (157 Mo. 51) is a construction of our present Constitution and statute, and holds that a building owned by a Masonic lodge, on account of the charitable designs and practices of such lodge, is exempt from taxation, so long as it is used exclusively for such lodge purposes, but when two of the floors of such building are rented for commercial purposes then the entire building becomes subject to taxation. In deciding that case it was said: 'There is a very material difference between the "use of a building exclusively for purely charitable purposes," and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation.'"

While there are no other Missouri cases which we have been able to find which have decided the precise point with respect to the real property of religious organizations which has been converted to income-producing rental property, yet there are a great many construing similar exemption provisions relative to educational and charitable organizations. In this regard, your attention is directed to *Y. W. C. A. v. Baumann*, 130 S. W. (2d) 499, and cases cited therein. In each of these cases a similar conclusion was reached to that arrived at in the *Y.M.C.A.* case from which the excerpt is cited supra.

The last expression of the Supreme Court of Missouri is found in *Evangelical Lutheran Synod, etc. v. Hoehn*, 196 S. W. (2d) 134 (not yet reported in State Reports), 1. c. 143:

"The prerequisites to tax exemption were:
(1) the use of the land itself, not merely its usufruct, for those exclusive purposes;
(2) the owner must be dedicated to those purposes. To that extent the ownership characterized the use. If the first were not true, a proper religious or charitable institution could have claimed tax exemption if, for instance, its real estate was merely rented out and the rentals devoted to its objectives--which is not the law.
* * * (Emphasis ours.)

CONCLUSION

In the premises, we are of the conclusion that real property owned by a religious organization which is converted to income-producing rental property is no longer used exclusively for religious purposes, even though the income derived therefrom is devoted to such purposes, and that thereby such real property loses its exemption from taxation.

We are further of the opinion that, upon compliance with the proper statutory requisites relative to assessment, levying of tax, publication of notice, etc., such real property

Honorable William S. Thompson - 5

may be sold to enforce the lien of the state for such taxes
so assessed and levied.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

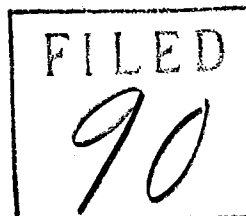
APPROVED:

J. E. TAYLOR
Attorney General

BUILDING AND LOAN ASSOCIATIONS: Real and tangible personal property assessable by county assessor under House Bill 469.

CONSTITUTION: State alone may assess intangible personal property under Article X, Section 4c, Constitution 1945.

February 1, 1946



7/14

Honorable Willard S. Tucker
Assistant Prosecuting Attorney
Springfield, Missouri

Dear Sir:

General Taylor wishes to acknowledge receipt of your recent request for an opinion from this department, which reads as follows:

"The repeal of Section 10963 of Article 2, Chapter 74, R. S. Mo. 1939, has presented a problem of considerable importance. This Section provides the means by which Building and Loan Associations are taxed. The assessors in fixing the tax list under this Section have always refrained from assessing the personal assets of the Associations. Now that the Section has been repealed by House Bill 469, and the new law is silent as to means by which these Associations can be taxed, our Assessor desires an opinion as to whether or not the personal assets of the Associations are now taxable.

"As this is a matter of general importance throughout the State we are submitting the question to your office and will appreciate an early reply."

Under the new Constitution adopted in 1945, taxable property is divided into three classes, Article X, Section 4(a), provides:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

The basis of assessment of tangible property is provided for in the first sentence of Article X, Section 4(b), which section states:

"Property in Classes 1 and 2 and subclasses of Class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of Class 2. Property in Class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

House Bill 469, referred to in your writing, undertakes to deal only with property of Class 1 and Class 2. In the explanation sheet of House Bill 469 it is stated that "sections and parts of sections dealing with intangible property have been omitted." Therefore, Section 10963, R. S. Mo. 1939, was repealed in the passage of House Bill 469. The reason for the omission of sections concerning intangible property becomes apparent from a reading of Article X, Section 4(c), Constitution of Missouri, 1945, which provides:

"All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned

as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

The assessment, levying and collection of taxes on intangible personal property is to be handled by the state as provided in this section to the exclusion of county assessors.

Section 10963, R. S. Mo. 1939, referred to in your letter, provided as follows:

"All parties holding stock or shares as owners or in trust in any building and loan association in this state, on which no loan has been obtained from such association, shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June in each year, and the tax shall be levied upon said shares, and collected from such holder or depositor of the same, as taxes on other personal property; and any failure on the part of such owner, holder or depositor of such shares shall subject such holder to the same penalties now provided for failure to give to the assessor a true list of all taxable property, verified by affidavit."

The taxable property encompassed by this section is stocks and bonds, which is intangible personal property of Class 3 and, as such, assessable only by the state.

Regarding real and tangible personal property of incorporations, Section 27 of House Bill 469, provides:

"The real and tangible personal property of all corporations operating in any county in the State of Missouri and in the City of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

Honorable Willard S. Tucker - 4

The case of *Musler v. Homestead Building and Loan Association of St. Louis*, 66 S. W. (2d) 152, l. c. 154, holds:

"Now a building and loan association, while peculiar in its features and having powers and functions closely fixed and circumscribed by statute, is nevertheless a business corporation."

Therefore, in so far as real and tangible personal property of building and loan associations are concerned, the county assessor may assess them as other corporations.

Conclusion

It is the opinion of this department that county assessors are authorized under House Bill 469 to assess the real and tangible personal property of building and loan associations.

It is our further opinion that under Article X, Section 4(c), Constitution of Missouri, 1945, county assessors may not assess any intangible personal property whether it be that of building and loan associations or otherwise.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

PUBLIC SCHOOL RETIREMENT SYSTEM:) County contributions for Super-
CONSTITUTION:) intendent of Schools do not
) increase Superintendent's salary
) so as to contravene Art. VII,
) Sec. 13, Const. of Mo. 1945.

October 7, 1946

FILED

92

Honorable Raymond E. Vogel
Assistant Prosecuting Attorney
Cape Girardeau County
Jackson, Missouri

Dear Sir:

We hereby acknowledge receipt of your request
for an opinion, which reads as follows:

"The Public School Retirement Act which became effective August 1, 1945, provides among other things that any County Superintendent of Schools, Assistant County Superintendent and those employed by the County Superintendent of Schools upon a full time basis are covered by the provisions of this act. The fund available for paying out retirement benefits is provided by payments from the salary of those covered by the act and by contributions from the employers of those persons. In the case of the County Superintendent of Schools the employer is the County.

"Article 7, Section 13 of the Missouri Constitution provides that the compensation of the state, county and municipal officers shall not be increased during the term of office. At the time the County Superintendent of Schools of Cape Girardeau County entered upon his term of office, a fixed salary was set. Inasmuch as the contribution made by the County ensures to benefit the Superintendent of Schools the question has arisen whether the

Public School Retirement Act insofar as it applies to the contribution by the county contravenes Article 7, Section 13 of the Constitution."

The determinative part of your request is that part which states:

"Inasmuch as the contribution made by the County enures to benefit the Superintendent of Schools * * *"

In other words, it is your interpretation that that portion of the funds contributed to the Public School Retirement System by the county in behalf of the Superintendent of Schools, amounts to an increase of his compensation or salary during his term of office. In deciding whether or not such contribution amounts to an increase in compensation, it is necessary to discuss a few sections of House Bill 151, which is the Act establishing the Public School Retirement System.

Sub-section 1 of Section 3 thereof, provides:

"The funds required for the operation of the retirement system created by this Act shall come from contributions made in equal amounts by members of the system and their employers, and from such interest as may be derived from the investment of any part of such contributions. All contributions shall be transmitted to the board of trustees by employers in such manner and at such times as the board by rule shall require."

Applying this section to the present situation, one-half of the total contribution is paid by the Superintendent of Schools and the other half by the county. That portion of the money paid in by the member, the Superintendent of Schools in this case, is to be individually accounted for by virtue of sub-section 17 of Section 2 of House Bill 151, which provides:

"The board of trustees shall provide for the maintenance of an individual account with each member, setting forth such data as may be necessary for a ready determination of the member's earnings, contributions

and interest accumulations. It shall also collect and keep in convenient form such data as shall be necessary for the preparation of the required mortality and service tables and for the compilation of such other information as shall be required for the valuation of the system's assets and liabilities." (Underscoring ours.)

The funds collected from the employer, or county in this case, are deposited with the custodian of the system along with the member's contribution, although the two funds are distinguishable at all times. Sub-section 1 of Section 4 of House Bill 151, provides:

"All funds arising from the operation of this Act shall belong to the retirement system herein created and shall be controlled by the board of trustees of that system, which board shall provide for the collection of said funds, shall see that they are safely preserved, and shall permit their disbursement only for the purposes herein authorized. All funds when collected shall be deposited with the custodian. The said funds and all other funds received by the retirement system are declared and shall be deemed to be the monies and funds of the retirement system and not revenue collected or moneys received by the State and shall not be commingled with State funds." (Underscoring ours.)

The principal reason for maintaining individual accounts for members is to reimburse that amount to him in the event he should cease being a member of the system prior to retirement. In that respect Sub-sections 3, 4 and 5 of Section 7 of House Bill 151, provide:

- (3) "If the total of the retirement allowances paid to an individual before his death is less than his accumulated contributions at the time of his retirement, the difference shall be paid to his beneficiary or to his estate, if there be no beneficiary.

- (4) "If a member dies before receiving a retirement allowance, his accumulated contributions at the time of his death shall be paid to his beneficiary or to his estate, if there be no beneficiary.
- (5) "If a member ceases to be a public school employee as herein defined and certifies to the board of trustees that such cessation is permanent or if his membership is otherwise terminated, he shall be paid his accumulated contributions with interest, if he has contributed for more than five years. If he has contributed for not more than five years, he shall be paid the amount he has contributed, without interest."

You will note that only the amount contributed by the member, plus interest in some cases, is to be reimbursed to the member or his beneficiary, and in this event it cannot be said that the county's contributions enure to the benefit of the Superintendent of Schools prior to his retirement.

The money that is received by a member of the system after his retirement is termed as a "retirement allowance" and it is in the nature of a pension, which is distinguishable from the compensation which he received prior to retirement. In the absence of a determinative case in Missouri concerning the distinction between compensation and a pension, we turn to other jurisdictions, and quote from the case of *Dickey v. Jackson*, 181 Ia. 1155, 165 N. W. 387, 1. c. 389, wherein it is stated:

"* * * The words 'pension' and 'compensation' are not synonymous * * * * *

The latter is ordinarily a gratuity from the government or some of its subordinate agencies, in recognition, but not in payment, for past services, though when provided as part of a scheme of employment it would seem to include some elements of a contractual character, and is doubtless intended to encourage faithfulness of service.* * *"

Concerning the term "pension," the case of *City of Lincoln v. Steffensmeyer*, 134 Neb. 613, 119 A.L.R. 914, 279

N. W. 272, l. c. 275, states:

"* * * a fair interpretation and definition of the term 'pension' is reflected by the following authorities, as set forth in Words and Phrases:

"'A "pension" is a stated and certain allowance made and granted by the government for valuable services performed in its behalf. It is a reward for continuous faithfulness in the discharge of public duty, and is a compensation for the hazard of the employment. In re Roche, 141 App. Div. 872, 126 N.Y.S. 766, 768.' 3 Words and Phrases, Second Series, 952.

"'A "pension" is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease.' Eddy v. Morgan, 216 Ill. 437, 75 N.E. 174, 178.' 3 Words and Phrases, Second Series, 952.

"'A pension is the regular allowance paid to an individual by the government in consideration of past services or in recognition of merit, and to the payment of which the whole resources of the government are pledged. Hawkins v. Randolph, 149 Ark. 124, 231 S. W. 556, 559.' 5 Words and Phrases, Third Series, 930.

"'A "pension" is usually regarded as a matter of grace and not of right. Gleason v. Board of Com'rs of Sedgwick County, 92 Kan. 632, 141 P. 584, 585.' 5 Words and Phrases, Third Series, 930."

It can be readily seen that compensation or salary paid for services performed is distinguishable from the retirement allowance or pension paid subsequent to retirement. The

member of the system cannot be benefited by the county's contributions prior to his retirement and it cannot therefore be said that by this contribution his compensation or salary has been increased during his term of office.

Conclusion

In the premises, it is the opinion of this department that the funds contributed to the Public School Retirement System by a county as the employer of a Superintendent of Schools, do not amount to an increase in the Superintendent's compensation so as to be in contravention of Article VII, Section 13 of the Constitution of Missouri, 1945.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

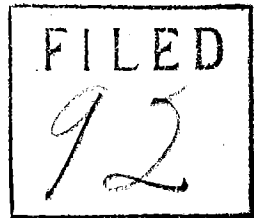
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

2 P. Smith
MAGISTRATE COURTS: Providing for establishing and maintaining
of offices of magistrates.

October 18, 1948
11-15



Honorable Erwin F. Vetter
St. Louis County Law Department
Clayton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a request for an official opinion from this department which is as follows:

"The question has arisen here as to the authority of the County Court to appropriate out of the general revenue fund of the County such sums as may be necessary to establish and maintain the magistrate courts created under the provisions of Senate Bill No. 207. It is estimated that the establishment and maintenance of these courts in St. Louis County will cost approximately \$40,000.00 annually.

"The Bill provides for the payment to the State of all fees collected and the State is required to pay the salaries of the magistrates and their clerks.

"Section 12 of the Act requires the magistrate courts to be located at the county seat and authorizes the County Court in counties of the First Class which have more than one magistrate district to determine the situs or location of such courts within the County. The Section also provides that the County Court may, by proper order, provide additional places in the County for the holding of magistrate court.

"It is our view, having in mind the legislative history relating to these minor tribunals, that the establishment and maintenance of these courts is the obligation of the State. The State receives

the fees collected and I am inclined to the conclusion that it was the intention of the Legislature to require the State to assume the corresponding burden of establishing and maintaining them. By interpretation, this court should not be saddled upon the counties.

"The question involved concerns all the counties of the State and it is, therefore, desirable that it be determined by the Attorney-General's office."

This section is the only provision of the law relating to magistrates which makes any reference to establishing and maintaining magistrate courts. The act requires that the salaries of the magistrates be paid out of the state treasury except in cases of additional magistrates, and it also requires that the fees of the magistrates, whose salaries are paid out of the state treasury, be paid to the Director of Revenue. The act also provides that fees paid to magistrates, whose salaries are paid out of county revenue, shall be turned into the county treasury. Section 24 of Article 5 of the Constitution of 1945 makes the same provision.

Apparently the lawmakers concluded that if the compensation of magistrates is to come out of the state revenue that the fees accruing to those officers should be paid into the state treasury. This policy is in line with the laws relating to county officers who are paid salaries and who are required to pay their fees into the county treasury. In those cases in which the county officers, such as circuit clerks, county clerks, recorders, prosecuting attorneys, etc., are paid a salary out of county revenue and where they turn their fees into the county treasury, the burden seems to have been imposed upon the counties to maintain such officers, regardless of whether or not the fees collected by the officers are sufficient to pay the salary of the officer.

In considering this question, the following rule of statutory construction would be applicable:

"All parts of a statute must, if possible, be given meaning and effect to ascertain and give effect to the legislative intention. Ex parte Andrews 18 S.W. (2d) 580."

Applying this rule here, if no provision has been made for the establishment and maintenance of magistrates' offices, then the Senate Bill 207, supra, would be meaningless and inoperative. While the Senate Bill does not in plain words specify who shall establish and maintain the offices of the magistrates, still it is our duty to search through the bill and other statutes and find some language or provision whereby that duty is expressly or impliedly imposed on either the state, the county or the magistrate. This is necessary in order to give the act some meaning and so that it will be in force and effect.

The burden of establishing and maintaining the magistrates' offices could fall on either of the three following agencies: (a) the magistrate, (b) the county, (c) the state. In the early period of this state, we find some cases in which the officers who were on a fee basis and where no provision for the establishment and maintenance of their offices was provided by statute, then the burden fell on the county. The case of County of Boone vs. Todd, 3 Mo. 140, was one of the earliest cases in which the court had before it such a question. The law, applicable to circuit clerks at that time, provided that the clerk procure a seal, purporting to be the seal of the court of which he is clerk, with such emblems, etc., and a screw and other necessary apparatus for impressing the same, and shall provide and safely keep and preserve suitable books, furniture and other necessities for their respective offices, and keep regular and faithful accounts thereof. In that case, the clerk's bill for rental of an office had been presented to the county court, who refused to pay same. In speaking of the duties of the county court and respect to furnishing county offices, the court, at 1. c. 143, said:

* * * * With regard to the counties, the law requires that they should have land, a public square at least, on which a court house, jail and public offices are to be built. The offices to be built as soon as the condition of the county funds will admit of it. It is made the duty of the County Court, therefore, to provide houses for the public offices belonging to the counties, and until this is done, the county has no right to throw this burthen on the clerk; but should pay rent unless some equivalent is given to the clerk for the use of his house. * * *

In the case of Ewing vs. Vernon County, 216 Mo. 681, and in the case of Harkreader vs. Vernon County, 216 Mo. 696, we

find the questions similar to the one here under consideration were before the Supreme Court. In those cases, county officers had incurred expenses in the maintenance of their offices and the County of Vernon was billed for these expenses. There was no statutory provision wherein the duty was imposed upon the county to pay for such expenditures. In the Ewing case, the bill which was presented to the county court for payment was for janitor service in the recorder's office. In the Harkreader case, the bill presented to the county court for payment was for janitor service in the sheriff's office. In both of these cases, the court held that the county was liable for these expenditures even though there was no provision in the statute obligating the county to pay them. The opinions in the two Vernon county cases cite a number of cases which have been before the Missouri Supreme Court and all of them hold to the effect that the expenses of maintaining and operating an office should be borne by the county in which the office is located. In the case of Rinehart vs. Howell County, 153 S.W. (2d) 381, which was before the Missouri Supreme Court in 1941, it was held that stenographic expenses of the prosecuting attorney which were necessary were recoverable against the county even though there was no statute authorizing the prosecuting attorney to employ a stenographer.

These cases, we think, clearly establish the rule that the expense of maintaining and operating an office may not be imposed upon an officer.

The next question is, are these expenses of establishing and operating the magistrate offices imposed on the state as stated above. There is no provision in the law whereby it can be ascertained that the lawmakers have expressly or impliedly imposed the duty on the state to pay for them. From an examination of the appropriation bills, we find that no appropriation was made by the 63rd General Assembly to meet such expenditures. Therefore, we do not think there is any authority to impose this obligation on the state.

Since these expenses may not be imposed upon the officer, and since the law makes no provision for them to be imposed upon the state, we go into the question of whether or not they may be imposed upon the counties. Section 18 of the Act provides that "the county seat shall be the seat of the magistrate court, and the county court may, by proper order, provide an additional place or places in the count for the holding of magistrate court." If this expense is imposed upon the counties, the cost of the establishment of the offices would be very little in counties having a population of 30,000 or less, because the probate judge in those counties is the magistrate and the office

of the probate judge could be used as the magistrate's office. Counties with a population of 30,000 or less includes all of the third and fourth class counties in the state except 14 of such classified counties.

The term "county seat" is defined in Words and Phrases, Permanent Edition, Vol. 10, page 118.

"County seat," as used in the various territorial acts of Michigan, meant the place designated for doing the county business--a place at which the public buildings were to be erected, where the probate and county courts were to be held and the county offices located, and where the board of supervisors were to hold their sessions. The county seat did not necessarily mean the same thing as 'seat of justice,' or the place of the holding of the circuit court."

The word "procure" is defined in Words and Phrases, Permanent Edition, Vol. 54, page 660, as to mean "to procure beforehand or to furnish," *Hoffman vs. Martin et al.*, 119 S.W. (2d) 1027.

The language, whereby it is provided that the county court may provide an additional place for magistrate court, lends support to the thought that the lawmakers intended that the county court would furnish the place or places for the holding of magistrate courts. Section 15702 R.S. No. 1939, as repealed and re-enacted in House Bill 758 of the 68th General Assembly, provides that the county court in each county shall erect and maintain at the established seat of justice a room and sufficient courthouse, jail and necessary fire-proof buildings for the preservation of the records of the county.

The foregoing references, statutes and reasonings lead us to the conclusion that since no provision has been made whereby the duty of establishing and maintaining magistrate's offices has been imposed upon the state or upon the magistrate, and since there is some indication from the Magistrate's Act that it was the intention of the General Assembly to impose this duty on the counties, it therefore follows that the duty of establishing and maintaining the office is upon the county courts of the respective counties.

Hon. Erwin F. Vetter

(6)

CONCLUSION

Therefore, it is the opinion of this department that it is the duty of county courts to establish and maintain out of the county funds the offices of the magistrate courts in their respective counties.

Respectfully submitted,

WYATT M. BROWN
Assistant Attorney General

APPROVED:

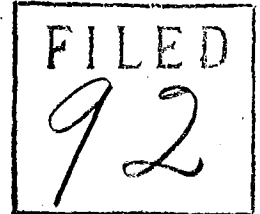
J. E. TAYLOR
Attorney General

TWF:VLM

47
Copy to
J. Smith

TOWNSHIPS: Fiscal year of townships shall run from the first Monday in March to the first Monday in March of the next year.

November 14, 1946



Honorable C. G. Vogt
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date, requesting an opinion of this department, which reads as follows:

"Would you give me an opinion on the following question?

"When does the fiscal year of the township start and end in counties under township organization?

"Our townships run out of money and some of them want to know the time they must stop issuing warrants."

The fiscal year of the State and its agencies is fixed by Section 23, Article IV of the Constitution of 1945, which provides, in part, as follows:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. * * *"

In the case of State ex rel. Montgomery, et al. v. Nordberg, 193 S.W. (2d) 10, the Supreme Court had before it the question of whether or not the above section applied to counties. In holding that this section was not applicable to counties it was said, at l. c. 12:

"* * * The Constitutional Convention was adopting an entire new Constitution--unlike a legislative act dealing only with one subject. The Convention was framing a fiscal plan not only for the state and its central agencies, but also for counties, townships and cities. Therefore, is it not fair to say that if the Constitutional Convention had intended to change the fiscal year for counties it would have said so? * * * * *

Using the above reasoning of Judge Ellison, we believe that, since there was nothing said about the fiscal year of townships in the Constitution, then the General Assembly would have the power to fix such year. The General Assembly has not passed a specific act designating the fiscal year of townships. Therefore, it will be necessary for us to determine what is meant by a "fiscal year" and then determine from the township organization what the township's fiscal year is.

In the case of Moose v. State, 5 S.W. 885, 49 Ark. 499, the court, in determining the meaning of "fiscal year," stated, at l. c. 887:

"The term 'fiscal year,' as far as it relates to the financial operation of counties, where the law has not declared when it shall begin or end, must mean the current year, embraced between the dates of the collector of taxes' annual settlements."

In the case of Union Trust & Savings Bank v. City of Sedalia, 254 S.W. 28, the Supreme Court of Missouri adopted the following definition of "fiscal year," at l. c. 31:

"The term 'fiscal year' is defined by the leading lexicographers as follows: Funk & Wagnall's New Standard Dictionary defines the term 'fiscal year' as 'the financial year at the end of which the accounts are balanced.' Webster's International Dictionary defines fiscal year as 'the year by or for which accounts are reckoned, or the year between one annual time of settlement or balancing of accounts, and another.'"

Therefore, we conclude from the above authorities that "fiscal year" when relating to townships, means the financial year of the township, at the end of which the Treasurer and the Collector would make their annual settlement with the County Court.

Section 13990, R. S. Mo. 1939, provides:

"At the meeting of the county court on the first Monday in March in each year, or at such other time as may be directed by law, the county treasurer shall make a full and complete settlement of his accounts, and exhibit his books and vouchers relating to the same, which settlement of his accounts, when accepted by the court, shall be entered of record by the county clerk."

Section 14000, R. S. Mo. 1939, provides:

"The township collector of each township shall, at the term of the county court to be held on the first Monday in March of each year, make a final settlement of his accounts with the county court for state, county, school and township taxes and produce receipts from the proper officers for all school and township taxes collected by him, less his commission on same, at which time he shall pay over to

the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes, and shall at the same time make his return of all delinquent or unpaid taxes, as required by law, and shall make oath before said court that he has exhausted all the remedies required by law for the collection of said taxes. He shall also, on or before the twentieth day of March in each year, make a final settlement with the township board. If any township collector shall fail or refuse to make the settlement required by this section, or shall fail or refuse to pay over the state and county taxes, as provided in this section, the county court shall attach him until he shall make such settlement of his accounts or pay over the money found due from him; and it shall be the duty of said court to cause the clerk thereof to notify the state auditor and the prosecuting attorney of said county at once of the failure of such township collector to settle his accounts, or pay over the money found due from him, and the state auditor and the prosecuting attorney shall proceed against such collector in the manner provided in section 14014 of these statutes, and such collector shall be liable to the penalties in said section imposed."

In reading the above two statutes it will be noted that the township treasurer and collector must settle their accounts with the county court on the first Monday in March. This shows that the intention of the General Assembly was to establish a financial, or, fiscal year for a township from the first Monday in March in one year to the first Monday in March of the next year.

CONCLUSION

Therefore; it is the opinion of this department that the fiscal year of a township begins on the first Monday in

Hon. C. G. Vogt

(5)

March of one year and runs to the first Monday in March of the next year.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

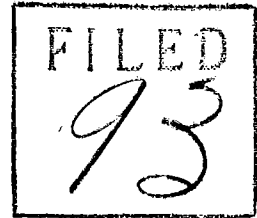
APPROVED:

J. E. TAYLOR
Attorney General

PW:CP

HIGHWAYS: Several questions concerning parking of vehicles on state highways, and authority of the Highway Patrol in connection therewith.

January 29, 1946



Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for our official opinion, as follows:

"We would like to have opinions from your office on the following questions which concern the control of the parking of vehicles along public highways.

"Section 8385a of the Motor Vehicle Laws of the State of Missouri requires that all vehicles not in motion shall be placed with their right sides as near the right-hand side of the highway as practicable.

"Does this section prohibit the parking of vehicles at an angle on the shoulder of a highway outside of an incorporated area?

"Does the term 'highway' as used in the Motor Vehicle Laws include the total distance between right-of-way lines or just the traveled portion of the roadway including the shoulder?

"On a highway, of which the traveled portion is maintained by the State and the shoulders have been improved by the property owners, can the State prohibit angle parking?

"Section 8361 requires the driver of any vehicle or the rider of any animal to obey any reasonable signal or direction of any member of the Patrol given in directing the movement of traffic on highways.

"Under this section, does the Patrol have authority to prohibit the parking of vehicles on highways outside of incorporated areas, when the parking of such vehicles constitutes a traffic hazard?

"Can the Patrol post signs prohibiting such parking and institute criminal procedure against persons who disregard such signs?

"Numerous requests have been received by this department and by the State Highway Department for the removal of traffic hazards caused by the parking of vehicles in congested rural areas.

"Therefore, we will appreciate receiving your opinion on the above questions as soon as possible."

Section 8385, subsection (a), of the Motor Vehicle Laws, Article 1, Chapter 45, R. S. Mo. 1939, is as follows:

"All vehicles not in motion shall be placed with their right sides as near the right-hand side of the highway as practicable, except on streets of municipalities where vehicles are obliged to move in one direction only."

In answering the questions submitted by you concerning this section, it is necessary to define the words "highway" and "practicable". Under Section 8367, R. S. Mo. 1939, a part of the Motor Vehicle Laws, we find the following definition of "highway":

"'Highway.' Any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways, or alleys in any municipality."

A "public thoroughfare" is further defined as "a place or way, through which there is passing or travel, and becomes 'public' when the public have a general right of passage." Vol. 35, Words and Phrases, p. 353.

The word "highways," as used in the Motor Vehicle Laws, has been the subject of judicial comment in this state. In *Crocker v. Jett*, 93 S. W. (2d) 74, we find the following reference to the word, l. c. 76:

"It is pertinent to observe in this connection that the word 'highways' is used in the statute in its popular, rather than its technical, sense, and is intended to include all highways traveled by the public, regardless of their legal status. *Phillips v. Henson*, 326 Mo. 282, 30 S. W. (2d) 1065."

In *La Rue v. Borrman et al.*, 22 N. Y. S. (2d) 209, the question for determination was a proper definition of the word "highway." The shoulders were held to be an integral part, in the following language, l. c. 213:

"The shoulder of a highway is part of the highway and may be used for travel."

It can be seen from the statutory definition quoted above and the liberal interpretation given by our courts that the word "highway" would include the entire right-of-way, including parkways and shoulders.

The word "practicable," as used in the Motor Vehicle Act, is defined in *Lauck v. Reis*, 310 Mo. 184, l. c. 201, as synonymous with "possible." In *Klohr v. Edwards*, 94 S. W. (2d) 99, its meaning was compared with that of the word "practical," and the court stated, l. c. 104:

" * * * Though there is a difference in the strict lexical meaning of the two words, they are not uncommonly used as synonymous; that is, as meaning feasible, or capable of being done or accomplished. It is obviously in this sense that the word 'practical' is used in the instruction, and it could hardly be otherwise understood in the connection in which it is used. 49 C. J. 1309, 1310."

We can, therefore, give no steadfast rule for the exact position in which vehicles must be parked, under the statute quoted above, since the circumstances might vary with the condition of the highway at that point, and must resort to the statement that in each case it would be a question of fact whether the vehicle was parked "with its right side as near the right-hand side of the highway as practicable." If the condition of the highway or right-of-way is suitable for parallel parking, the vehicles should be parked in that manner.

As to your question whether angle parking may be prohibited by state authorities, we believe that to be fully answered by what has just been said, and fail to find any statutory authority permitting any state agency to specifically prohibit angle parking. Under the duties and powers of the State Highway Commission, we find:

"Sec. 8752. The commission shall:
(1) Have supervision of highways and bridges which are constructed, improved and maintained in whole or in part by the aid of state moneys, and of highways constructed in whole or in part by the aid of moneys appropriated by the United States government, so far as such supervision is consistent with the acts of congress relating thereto.
* * * "

Under this general authority, we believe that the State Highway Commission has power to direct that no use shall be made of any portion of the right-of-way which interferes with the use by the general public of the highway as a thoroughfare or which would obstruct or provide a hazard for the customary traffic. We do not believe that the Commission or any other agency, under the present laws, could arbitrarily prohibit parking in any area in which such parking did not interfere with or obstruct ordinary use of the highway.

Section 8361, R. S. Mo. 1939, referred to by you in your request, is as follows:

"It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. Any person who wilfully fails

or refuses to obey such signals or directions or who willfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

Your first question with reference to this section asks whether the Patrol may prohibit the parking of vehicles on the highways outside of cities or towns when such parking constitutes a traffic hazard. The only portion of the above section which might bear on this question is that portion requiring obedience to "any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highway," and here again we must resort to the question of fact as to whether or not an order given to the owner or driver of a parked vehicle to cease possible obstruction of traffic would be "reasonable." If such owner or driver was in fact obstructing the movement of traffic, then he should obey the order of the member of the Patrol to remove the vehicle so offending.

We find no provision in the laws permitting the Highway Patrol to post signs prohibiting parking or any other signs along the public highways. The State Highway Commission, under Section 8755, R. S. Mo. 1939, is authorized to erect proper markings, warning signs or danger signals. The pertinent portion of that section is as follows:

" * * * The commission is authorized to erect, or cause to be erected danger signals or warning signs at railroad crossings, highway intersections or other places along the state highways which the commission deem to be dangerous. * * * "

No penalty has been provided for failure to obey these warning signs. In *Roberts v. Wilson*, 33 S. W. (2d) 169, (Kansas City Court of Appeals), a stop sign erected at an intersection by the State Highway Commission under the above authority had been disregarded by the driver of a vehicle, and the court held that he was subject to no penalty, in the following language, 1. c. 172:

" * * * There is no statute, so far as we know, requiring one to observe the warning implied in the stop signal, * * * ."

CONCLUSION

It is, therefore, our opinion that (a) vehicles not in motion should park with their right sides as near the right-hand side of the right-of-way as possible or practical; (b) that the term "highway" in the Motor Vehicle Laws includes the entire right-of-way; (c) that no agency is authorized to prohibit "angle parking" as such if the vehicle is as near the right-hand side of the highway as practical; (d) that a member of the Highway Patrol may direct the owner or driver of a vehicle to move his vehicle if same is an obstruction to the movement of traffic on the highways of the state, and (e) that the Patrol has no authority to post signs prohibiting parking along the public highways, nor could it institute criminal procedure against persons disregarding such signs.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

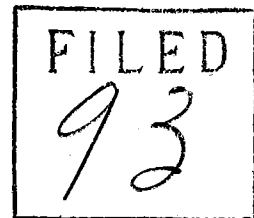
APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

MOTOR VEHICLES: Passenger car used commercially subject to commercial motor vehicle fees.

February 16, 1946



7/20

Hon. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for our official opinion, as follows:

"We respectfully request that you furnish this department with an opinion on the following question in connection with section 8369, Laws of 1943:

"A man uses his passenger car to tow a four-wheel trailer, hauling freight for hire, the trailer capable of carrying a load of four or five tons. Should the passenger car have truck license plates and what size license should he be required to purchase?"

Section 8369, Laws of 1943, page 664, provides registration fees for two types of vehicles, commercial and "motor vehicles other than commercial."

Section 8367, R. S. Mo. 1939, gives the following definition of a "commercial motor vehicle":

"A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers."

Since you state in your request that the vehicle concerned is used for hauling freight for hire, it would be defined as a "commercial motor vehicle," and the fees set out in the following portion of Section 8369, Laws of 1943, page 664, would be applicable:

"For commercial motor vehicles having a gross weight of:

Under 1,500 pounds	\$10.00
1,500 pounds to 10,000 pounds.....	15.00
10,000 pounds to 12,000 pounds.....	20.00
12,000 pounds to 18,000 pounds.....	30.00
18,000 pounds to 20,000 pounds.....	40.00
20,000 pounds to 22,000 pounds.....	50.00
22,000 pounds to 28,000 pounds.....	65.00
28,000 pounds to 32,000 pounds.....	100.00
32,000 pounds to 38,000 pounds.....	125.00
38,000 pounds to 42,000 pounds.....	150.00
42,000 pounds to 44,000 pounds.....	175.00
Over 44,000 pounds.....	200.00

"For each trailer or semi-trailer there shall be paid a fee of three dollars (\$3.00). The fees for tractors used in any combination with trailers or semi-trailers or both trailers and semi-trailers shall be computed on the total gross weight of the vehicles in the combination with load." (Italics ours.)

If the passenger car mentioned in your request can be considered a "tractor" within the meaning of the italicized sentence quoted just above, then the fee to be paid on such car used for commercial purposes would be that provided for the gross weight of the passenger car, four-wheel trailer and such load as either or both contained.

The word "tractor" is defined in Section 8367, R. S. Mo. 1939, as:

"Any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently." (Italics ours.)

While a passenger car is not ordinarily used in such a capacity, yet if the owner sees fit to use such a vehicle for drawing a trailer, it must be held to fall within the general terms of the italicized portion of the definition just quoted and be subject to the appropriate fee.

It should be noted that in Section 8369, Laws of 1943, page 664, provision is made that commercial motor vehicles which

Hon. Hugh H. Waggoner - 3

have limited use geographically are subject only to a portion of the fees provided for vehicles having a statewide use.

CONCLUSION

In view of the above, it is our conclusion that a commercial motor vehicle consisting of a passenger car as tractor and a four-wheel trailer, hauling freight for hire, is subject to the fees set out in Section 8369, Laws of 1943, page 664, computed on the total gross weight of the vehicles in the combination with load.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

COUNTY JAILS: Necessity of receiving prisoners committed for violation of ordinances of cities of the third class.

February 20, 1946

FILED 93

Honorable Henry G. Walker
Prosecuting Attorney
Kennett, Missouri



Dear Sir:

Reference is made to your letter dated February 15, 1946, requesting an official opinion of this office, and reading as follows:

"Two members of the County Court have instructed me to write you and request your opinion on the following matter.

"The City of Kennett places the prisoners charged with a violation of the City Ordinances in the County Jail, both upon arrest, and after trial, when the prisoners are serving their sentence. The City pays the board bill of seventy five cents per day per prisoner on the City prisoners. The City owns a City Hall, but I doubt if it would be contended that it is adequate to care for the prisoners in its present condition.

"The questions which I am instructed to ask your opinion on are: One. Does the City have the right to place its prisoners in the County Jail, if the County Court objects and makes an order instructing them not to do so, and instructing the Sheriff not to receive them? Two. If the City can place its prisoners in the County Jail under the circumstances outlined above and in question one, does the County Court have the power and right to charge the City rent for the use of said Jail, or require the City to pay any portion of the expenses of operating said jail, other than the board bill of said prisoners?

"I might state that all of the Cities and Towns in this County use the County Jail, when needed, in the same way the City of Kennett does, though of course not to the same extent."

With respect to the first question you have asked, we direct your attention to Section 7360, R. S. Mo. 1939, which reads as follows:

"If any city as in this chapter provided for have no suitable and safe place of confinement, the defendant may be committed to the common jail of the county by the mayor or police judge of such city, and it shall be the duty of the sheriff, upon the receipt of a warrant of commitment from the mayor or police judge, if he have room, to receive and safely keep such prisoner until discharged by due process of law. Such city shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody."

We further direct your attention to the provisions of Section 9196, R. S. Mo. 1939, which reads as follows:

"It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

From the above quoted statutes, it is apparent that cities do have authority to confine persons found guilty of violating city ordinances in county jails if such cities do not have suitable or safe places of confinement for that purpose.

There may be some question in your mind as to the applicability of these sections to the confinement of persons prior to trial and conviction. Based upon the last census, we note that the City of Kennett falls within the population brackets

of a third class city. We assume that it is in that class. It thereupon becomes pertinent to determine the committing authority of the judicial officers of cities of the third class. In that regard, we direct your attention to Section 6909, R. S. Mo. 1939, reading as follows:

"When any person shall be arrested and brought before the police judge, it shall be the duty of the police judge to hear and determine forthwith the complaint alleged against the defendant, unless for good cause the trial be postponed to a time certain, in which case he shall require the defendant to enter into recognizance, with sufficient security, conditioned that he will appear before the said police judge at the time and place appointed, then and there to answer the complaint alleged against him; and if he fail or refuse to enter into such recognizance, the defendant shall be committed to prison and held to answer such complaint as aforesaid. Defendants shall be entitled to a trial by jury as in prosecutions before justices of the peace." (Emphasis ours.)

Also, to the further provisions of Section 6916, R. S. Mo. 1939, reading as follows:

"If the defendant plead or be found guilty, the police judge shall declare and assess the punishment prescribed by ordinance, according to his finding or the verdict of the jury, and render judgment accordingly and for costs of suit, and that the defendant stand committed until judgment is complied with." (Emphasis ours.)

From the latter two statutes quoted, it further appears that the police judge of cities of the third class has committing power in either of two instances: (1) Failure to enter into recognizance for appearance for trial and (2) in conformity with verdict of guilty and judgment of commitment after trial.

From the above, we are persuaded to the opinion that the county court has no authority to order the sheriff to refuse to receive persons charged with violation of city ordinances

pending trial or in conformity with verdict of guilty and judgment of commitment imposed in conformity thereto. You will also note that under the provisions of Section 9196, R. S. Mo. 1939, quoted above, it is made a misdemeanor for the sheriff or jailer to refuse to receive any such persons when lawfully committed.

With reference to the second question which you have asked, we believe that the concluding portion of Section 7360, R. S. Mo. 1939, quoted supra, to be the only statute relating to the charges that may lawfully be imposed upon cities for confinement of prisoners committed by them in the county jails. We are unable to find any statutes which might be thought to impose additional liability upon such cities, or under which the county court could lawfully require, as a condition precedent to confining such city prisoners in the county jail, that the city make contributions toward the maintenance and upkeep of the county jail. Lacking such statutory authority, we believe that the county court may not lawfully make such requirement.

CONCLUSION

In the premises, we are of the opinion that persons committed for failure to enter into recognizance for appearance for trial upon charges of violating ordinances of cities of the third class, or persons committed pursuant to the verdict finding them guilty of the violation of ordinances of cities of the third class and judgment of commitment in conformity therewith, must be received into county jails, provided that such cities of the third class do not have suitable and safe places for confining such prisoners, and further provided that there be room for such prisoners in the county jail.

We are further of the opinion that the county court cannot lawfully make any further charges for the keeping of such prisoners in the county jail beyond the payment by such city of the board of such prisoners at the same rate as is then being allowed by law to the sheriff for the keeping of other prisoners in his custody.

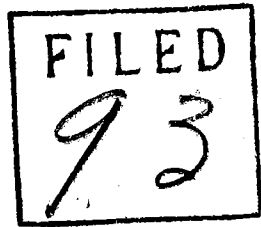
Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MOTOR VEHICLES: Computation of maximum allowable axle load
of trucks.



June 4, 1946

6/4

Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office upon the matters outlined in a letter to you from Capt. Otto L. Viets, which was enclosed therewith, reading as follows:

"1. Section 8406, Missouri Laws, 1945, relates to gross weights of motor vehicles and reads in part: 'Nor shall the total gross weight, with load on any group of axles of a vehicle or combination of vehicles where the distance between the first and last axles of the group is eighteen (18) feet or less exceed the weight in pounds compiled by multiplying the distance in feet between the first and last axles of such group under consideration plus forty (40) by six hundred fifty (650).' This section concludes: 'For the purpose of this section on "axle load" shall be defined as the total load imposed upon the highway through all wheels whose centers are included within two parallel transverse vertical planes not more than forty (40) inches apart.'

"2. Tandem axles which would come under the term 'group of axles' are in common use under semi-trailers. The usual distance between axles on tandems is forty-two inches or more in even inches. The State Highway Commission has prepared a schedule for quick reference by patrolmen

and weight clerks as to the various allowable weights on the various distances between axles. This schedule is graduated by inches and begins with three feet five inches and up to and including eighteen feet. Since the schedule begins with three feet five inches, it has normally been the policy of patrolmen and weight clerks to consider tandem axles with less than forty-one inches distance between centers of axles as one axle.

"3. It is now found that manufacturers are making tandem axles which measure forty inches or a fraction of an inch less by the unusual method of measuring with a tape measure. The makers of the tandems maintain that they measure forty inches plus a fraction of an inch which may be as low as one sixty-fourth of an inch, by measuring with special instruments.

"4. It is requested that an opinion be obtained from the Attorney General to ascertain if a tandem axle measuring a slight fraction of an inch over forty inches should be considered as a tandem or if it must be over forty inches in full inches before it should be considered as a tandem and for the purpose of determining the 'axle load.'"

A determination of the question which you have propounded involves a consideration of a portion of Section 8406, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, p. 667, wherein a definition of "axle load" is found. The pertinent part of the statute mentioned reads as follows:

"For the purpose of this Section an 'Axle load' shall be defined as the total load imposed upon the highway through all wheels whose centers are included within two parallel transverse vertical planes not more than forty (40) inches apart."

The statute is clear and unambiguous and, in the premises, we deem the following rule enunciated in *St. Louis Amusement Co. v. St. Louis County*, 147 S. W. (2d) 667, 1. c. 669, applicable:

"We need not conjecture as to the intent of the legislature in creating this exemption because we find the language of the statute is plain. And where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

Applying this rule to the language found in Section 8406, supra, we can arrive at no other conclusion but that when the statute reads "not more than forty (40) inches apart," it must be given the clear and unambiguous meaning which it imports. Therefore, any group of axles the centers of which measure more than forty inches apart must be considered tandem axles, in accordance with the plain terms of the statute.

Further, under the provisions of Section 8410, R. S. Mo. 1939, a violation of the maximum allowable load provisions of Section 8406, R. S. Mo. 1939, is made a misdemeanor. Said section reads as follows:

"Any person, firm, corporation, partnership or association violating any of the provisions of sections 8405 to 8409, inclusive, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than five dollars (\$5.00) nor more than five hundred dollars (\$500.00) or by imprisonment in a county jail for a term of not exceeding twelve (12) months, or by both such fine and imprisonment."

The statute being penal in nature, the following rule of statutory construction found in *Anthony v. Kaiser*, 169 S. W. (2d) 47, 1. c. 48, must be adopted:

"Penal and criminal statutes, such as the one before us 'are generally "construed strictly as to those portions which are against defendants, but liberally construed in those which are in their favor--that is, for their ease and exemption. No person is to be made subject to such statutes by implication, and, when doubts arise concerning their interpretation, such doubts are to weigh only in favor of the accused.'" *State v. Taylor*, 345 Mo. 325, 133 S. W. (2d) 336, 341."

Col. Hugh H. Waggoner - 4

We note that in your letter of inquiry some distinction is purportedly made between measurements made by officers of the Missouri State Highway Patrol and measurements made by the manufacturers of the vehicles. The determination of the true distance is a question of fact which would necessarily be involved in any criminal prosecution under the statute mentioned. However, we might say that inasmuch as distances are capable of exact measurement, there should be no difference in the results obtained.

CONCLUSION

In the premises, it is the opinion of this department that any two axles the centers of which are not included within two parallel transverse vertical planes forty inches or less distant from each other are to be considered tandem axles in determining the maximum allowable load limits.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

PUBLIC SERVICE COMMISSION: A bus which is used to carry a school band from one town in Missouri to another town is within the exemption provisions of Section 5721 of the Public Service Act of Missouri.

SCHOOLS:

COMMON CARRIER:

June 15, 1946



Honorable Hugh H. Waggoner,
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

We acknowledge receipt of your letter of recent date in which you request an opinion of this department as follows:

"We respectfully request that you give us an opinion upon the legality of the operation of a motor vehicle under the circumstances as set out below.

- a. The Schulte Transit Company of Crystal City, Missouri, is licensed by the Public Service Commission to operate as a common carrier. Their permit does not authorize service to Columbia, Missouri. On May 4, 1946, this company transported for hire a school band from Festus to Columbia, Missouri, for educational purposes.

We would like to know if the operation of this vehicle under these circumstances exceeded the authority granted to the company by the Public Service Commission or could the operation be defined as a "school bus" as set out in Section 5720 Revised Statutes of Missouri, 1939, which would exempt them from police control as set out in Section 5721."

A consideration of the facts set out in your letter indicate that the sole question involved here is whether the Missouri State Highway Patrol would be in the exercise of its lawful powers in arresting the Schulte Transit Company for making the trip which your letter outlines. The determination of this question turns upon whether or not the particular trip made by the Schulte Transit Company on May 4, 1946, was

the type of operation which is exempt under the Public Service Act. If it was not an exempted operation the Missouri State Highway Patrol would have full authority to make an arrest of the Transit Company for violation of its Public Service certificate. On the other hand, if it was an exempted operation, then the Missouri Highway Patrol has no authority to take any action against the Company. We think there are two legal issues raised by this question.

(1) Can a motor carrier which holds a certificate under the terms of the Public Service Commission Act engage in an operation other than that for which they are authorized in their certificate?

(2) Is the transporting of a school band from Festus, Missouri, to Columbia, Missouri, for educational purposes, an operation which is exempt from the regulation of the Public Service Commission?

We think the case of Public Utilities Commission v. Congdon (1941 Maine) 18 Atl. (2d) 312, is decisive as to the first legal issue. In that case a carrier operated a truck under a Public Utilities Certificate on a certain route. He was operating local pick-up and delivery trucks in the City of Portland, and within fifteen (15) miles thereof, for which he held no certificate. The latter operation was an exempt operation under the statutes. The carrier handled certain shipments to Portland, over the routes for which he had a certificate, then transferred them to the local pick-up and delivery trucks and completed the transportation to a point outside the scope of his permit. The court stated that the carrier could not claim the pick-up and delivery trucks exemption within the City of Portland when he used the trucks merely to extend his carriage of freight beyond the specified termini which he was authorized to serve in his Public Service Certificate. The contention was also raised in the case that since the carrier was a long-haul carrier operating under a certificate, that it could not operate the local pick-up and delivery trucks in the manner in which it did. This, of course, raised the exact question which is necessary to determine here, namely, can a carrier operating under a certificate also carry on an exempted operation. In that regard the court said: (l.c. 316)

"We do not think that Section 10 (A) of the Motor Carrier Act exempts only 'the operation of the motor vehicles of the purely

local carrier' and not those 'of the long haul carrier operating under a certificate'. While, as already pointed out earlier in this opinion, the statutory exemption does not apply to the operation of the vehicles of a carrier for which he has no certificate or permit when they are being used to extend his own long-haul business, we are not of opinion that other motor vehicles which he owns and operates in purely local transportation for hire as defined in Section 10 (A) are thereby excluded from the exemption provision, or by the fact that the local carrier is also a common carrier operating under a certificate or permit issued by the Commission. We find no such express or implied exclusion in the Motor Carrier Act. The fact that the respondent operated local pick-up and delivery trucks owned by him in transporting the shipments of merchandise in controversy from Portland to Westbrook when and while he was also a common carrier operating under a certificate issued by the Public Utilities Commission was not a valid reason for suspending his certificate. * * *

Further authority in line with this case is found in *Re Greeley Transportation Co.*, Public Utilities Report Ann. 1932A, p. 55, in which the Colorado Public Utilities Commission said: (l.c. 57)

"The next question raised is whether or not one engaged as a common carrier may operate as a private carrier on routes or in territory over or in which a certificate does not authorize operation.

"While the conduct of such a private carrier operation by common carriers may demoralize or break down the whole system of regulation, the law seems rather clearly to permit such operations. Some of the cases so holding are *Chenery v. Employers' Liability Assurance Corp.* (1925) 4 F. (2d) 826, 827; *Claypool v. Lightning Delivery Co.*--Ariz--, P.U.R. 1931D, 396, 299 Pac. 126; *Houle v. Lewonis* (1923) 245 Mass. 254, 140 N. E. 427; *Ney v. Haun* (1921) 131 Va. 557, 109 S. E.

438, 18 A.L.R. 1310; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. Ed. 984, P.U.R. 1916D, 972, 30 Sup. Ct. Rep. 583."

We think, therefore, that the first legal issue must be answered in the affirmative.

Having established the right of the carrier to carry on an exempt operation it remains to be determined whether he was carrying on this type of operation. The second legal issue must be determined by an interpretation of the statutes creating the exemption to the provisions of the Public Service Act, and, therefore, from the regulation of the Public Service Commission. The statute in which the exemption is found is Section 5721, Revised Statutes of Missouri, 1939. This section has been amended by House Bill 137, passed by the 63rd General Assembly, and approved by the Governor, which will become effective July 1, 1946. House Bill 137 carries the same school bus exemption as Section 5721, Revised Statutes of Missouri, 1939, so that there will be no change in this respect in so far as House Bill 137 is concerned. Section 5721, Revised Statutes of Missouri, 1939, reads, in part, as follows:

"The provisions of this article shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor to any motor vehicle owned, controlled or operated as a school bus; * * *"

A school bus is defined in Section 5720e, Laws of Missouri, 1941, page 524, which reads as follows:

"The term 'School bus,' when used in this article, means any motor vehicle used to transport students to and from school (either public or private) or to transport pupils properly chaperoned, to and from any place within the state for educational purposes."

We find no cases in Missouri which have construed these sections with regard to the exemption of school bus operations. However, in Re Greeley Transportation Company, Public Utilities Report, page 55, supra, the Colorado Public Utilities Commission ruled on a similar point. There a carrier, licensed under the

Colorado Commission, transported students of the Colorado State Teachers College, Greeley, Colorado, to and from public schools in Gilcrest and Big Bend, Colorado, and high school students between La Salle and Greeley, Colorado. At the time this case was decided the Colorado Public Service Law contained an exemption of "the transportation of children to and from school". While the wording of this statute is not the same as that found in the Missouri law, it is, we think, of the same effect. If anything, the terms of the Missouri exemption statute are broader than that found in the Colorado act, because the Colorado act restricts the transportation exemption to the carrying of children "to and from school", which the Missouri act does not do. We think the main purpose, however, in both exemptions was to remove from regulation those buses used in connection with the education of children. The Colorado Commission dismissed the complaint against the carrier therein involved. Regarding the transportation of the school children the court said: (l.c. 56)

"The transaction with the State Teachers College is one entered into by the college in order to afford a limited number of its students training in the art of teaching.

"We are of the opinion, that the transportation of these students does not make the respondent a common carrier.

"The act relating to motor vehicles carriers, Chap. 134, Session Laws of Colorado, 1927, Sec. 23 thereof, purports to exempt from the act those persons engaged in 'the transportation of children to and from school' We are of the opinion that this language should not be strictly construed, and that transportation of six school students from La Salle to Greeley falls within the exception. * * *"

The Colorado Commission indicated that the transportation of high school students was for the purpose of taking them to school, and the students of the State Teachers College were transported to give them teaching training. We think the case is authority for an interpretation of the Missouri Statute because (1) the transporting of a school band for educational purposes is as much within the Missouri statute, which used the words "for educational purposes", as the transportation of high school students to school was within the terms of the Colorado statute which exempted the "transportation of children to and from school"; (2) the transportation of the Teachers College students appeared to be farther outside the scope of the Colorado act than the transportation of the school band was from the scope of the broad wording Missouri statute. The latter statement is made for the reason that the Teachers College students were not being transported to and from school

in the sense that they were attending regular college classes since the commission stated that they were being transported for teacher's training purposes. In other words, the students were not being transported from their home to their college classes, but from the State Teachers College to other public schools. The interpretation of the Colorado statute to exempt the transportation for teacher's training is, therefore, a broad interpretation since the statute could be construed as referring only to the ordinary transportation of school children from their homes to school. This case, we think, is determinative of the second legal issue involved, and necessitates an affirmative answer to the same.

CONCLUSION

It is, therefore, the opinion of this department that the operation of the Schulte Transit Company of Crystal City, Missouri, on May 4, 1946, in transporting for hire a school band from Festus, Missouri to Columbia, Missouri, was an exempt operation under Section 5720, Laws of Missouri, 1941, page 524, and Section 5721, Revised Statutes of Missouri, 1939, and that the Schulte Transit Company did not exceed the authority granted to it by the Public Service Commission of Missouri in undertaking said operation.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:dc

CONSTABLES: Power and duties in all counties except first class counties and the city of St. Louis after June 30, 1946.

FILED

93

June 15, 1946

Mr. Henry C. Walker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following facts:

"There have been several questions raised in this County by the Constable and other officers in reference to what effect the new Constitution and the laws passed in reference to same will have upon the Constable's duties and fees after June 30, 1946.

"Will the Constables who now are duly elected, qualified and acting continue to serve with the same duties and collect the same fees as now until the expiration of the term for which they were elected?

"If not, what will their status, compensation and duties be?"

The present General Assembly has passed Senate Bill No. 361, which relates to the question you asked and which is as follows:

"Section 1. That Sections 13370 as amended by an act of the 61st General Assembly, approved August 2, 1941, appearing in Laws of Missouri, 1941,

at page 325, and as further amended by an act of the 61st General Assembly, approved August 2, 1941, appearing in Laws of Missouri, 1941, at page 326, and Sections 13371 to 13381, both inclusive, the same being all of Chapter 97 of the Revised Statutes of Missouri, 1939, entitled 'Constables', be and the same are hereby repealed.

"Section 2. This act shall become effective on January 1, 1947, except that in counties in which the present terms of constables end after January 1, 1947, this act shall take effect at the expiration of the present terms of constables in said counties."

Section 1 of the above bill provides for the repeal of all existing statutes relating to the office of constable.

Section 2 of the above bill provides that the act shall become effective on January 1, 1947, except in counties in which the present term of constable ends after that date, and then it shall take effect at the expiration of the present term of the constable.

The General Assembly has also passed Senate Bill No. 362, relating to the powers and duties now exercised by constables, which is as follows:

"Section 1. Whenever the word 'constable' appears in any statute, except insofar as any such statute applies to the City of St. Louis and to counties of the first class, the same shall hereafter be deemed to refer exclusively to and to mean 'sheriff' unless such construction is plainly repugnant to the context of any such statute.

"Section 2. This act shall become effective on January 1, 1947 except that in counties in which the present terms of constables end after January 1, 1947, this act shall take effect at the expiration of the present terms of constables in said counties."

Mr. Henry C. Walkor

-3-

As can be readily seen, the sheriff of each county, except counties of the first class and the city of St. Louis, will generally exercise the powers and duties now exercised by the constable's office.

Senate Bill No. 362 has the same effective date as Senate Bill No. 361. Since these acts are not effective until January 1, 1947, or at the expiration of the term of office which the constable is now holding, the present statutes will remain in force and effect until that time. These statutes prescribe the duties, powers and compensation of the constable.

Conclusion.

It is the opinion of this department that the constables now holding office in all counties, except first class counties and the city of St. Louis, will continue to hold office until January 1, 1947, or until the expiration of their present term if after January 1, 1947, and will continue to perform the same duties and collect the same fees as now provided by law.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

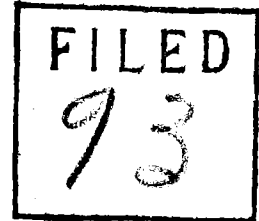
J. E. TAYLOR
Attorney General

WED:ml

2/16/46
7-26

CONSTITUTIONAL LAW: Law providing circuit judges shall
OFFICERS: approve compensation and appointment
INHERENT POWER OF COURT: of deputy sheriffs and deputy circuit
clerks is constitutional.

July 11, 1946



Mr. Wayne T. Walker
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"We have some new problems confronting us regarding the operation of the new Constitution and certain sections of the statutes enacted thereunder.

"Under Section 15547.209--The circuit judges of the counties of the second class are given the duties of setting the number of the sheriff's deputies and also their compensation.

"Under Section 13403.3--The circuit judges are given the duties of fixing the number and salaries of the deputies of the circuit clerk.

"Article 2 of the Constitution provides that the powers of the government shall be divided into three distinct departments--the legislative--executive and judicial--and further provides that one of these departments shall not exercise any power properly belonging to another unless specifically directed by the Constitution to do so.

"Section 11, Article 6--further provides that the compensation of all county

officers except those which adopt and amend a charter for their own government shall be compensated and paid as provided by law.

"The judges of our circuit court have temporarily approved the appointment of deputy sheriffs and circuit clerks for a period of three months and have also set their salaries but they have informed the writer that they think such appointments do not belong to them as judicial officers, and by doing so they are invading the province of another department of government in violation of Article 6, Section 11 and Article 2 of the Constitution as aforesaid.

"The judges contend it is not their duty or within their province to fix salaries because the salaries should be fixed by the legislature, in other words, it is their contention that the phrase of 'as provided by law' means that only the legislature can make laws, and therefore, the salaries should be set by the legislature."

"We shall greatly appreciate your opinion concerning these matters."

Replying thereto, it seems that the Section 15547.209 to which you refer is apparently an error. We are unable to find any new bill passed by the present Legislature having such a section. However, House Bill No. 939, which was approved by the Governor on April 11, 1946, appears to be the bill regulating sheriff's salary in counties of 75,000 to 200,000 inhabitants, and Section 9 thereof provides as follows:

"The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office. Such deputies shall be appointed by the sheriff, but no appointment shall become effective until approved by the judges of the circuit court of the county.

The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

The section recently enacted affecting the deputies and assistants to the clerk of the Circuit Court in counties of the second class is House Bill No. 893, which was approved by the Governor on March 15, 1946, and Section 13408.3 thereof is as follows:

"The clerk of the circuit court, in all counties of the second class, shall be entitled to such a number of deputies and assistants, to be appointed by said clerk, as the judges of the circuit court may deem necessary for the prompt and proper discharge of the duties of the office. Such deputies and assistants shall receive such salaries as may be fixed by the circuit court, to be paid out of the county treasury, in the same manner as the salary of the circuit clerk is paid."

It is observed that said last section provides that the clerk of the Circuit Court is entitled to such number of deputies and assistants, to be appointed by said clerk, "as the judges of the circuit court may deem necessary for the prompt and proper discharge of the duties of the office."

Section 9 of House Bill No. 939, above quoted, has a similar provision with reference to the deputy sheriffs, and the further provision that the judges of the Circuit Court, by agreement with the sheriff, shall fix the salaries of such deputies. In other words it appears that both of said above set forth sections require the affirmative approval of the judiciary as to the number of deputy circuit clerks and the number of deputy sheriffs, and their compensation, and your question is whether such provision is violative of the Constitution.

The 1945 Constitution of Missouri is identical with the 1875 Constitution insofar as the separation of power is concerned. See Section 1 of Article II of the 1945 Constitution, which is as follows:

"The powers of government shall be divided into three distinct departments- the legislative, executive and judicial- each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Article II of the 1945 Constitution was Article III of the Constitution of 1875.

The case of State ex rel. Allen v. Dawson, 284 Mo. 427, 224 S.W. 324, Supreme Court of Missouri, en banc, 1920, was an injunction suit instituted by two of the judges of the County Court of Buchanan County, and Buchanan County as plaintiff against the three circuit judges of said county, seeking to enjoin the judges from fixing the number of deputies in each of the offices of Buchanan County there concerned and to classify such deputies. It was there urged that the statute so authorizing was unconstitutional and was violative of Section 1 of Article VI, because the power conferred upon the circuit judges by the statute was not a judicial power. Other constitutional questions were also raised and the court had a beautiful opportunity to clarify the law on this point, but they did not pass on the constitutionality of the act. The court indicated that injunction was not the proper remedy, because the parties had an adequate remedy by law by quo warranto, on the theory that the power to appoint an officer was a franchise and sustained a writ of prohibition against the injunction suit. That case was commented on analytically in State ex inf. Walsh v. Thatcher in 1937, 102 S.W. (2d) 937, 1.c. 938.

In State ex inf. v. Washburn, 187 Mo. 680, 67 S.W. 592, 90 Am. St. Rep. 450, our Supreme Court, en banc, in 1902 decided an interesting case which dealt with the power of appointment with reference to the Constitution and the division of powers. At page 695 (Mo.) the court said:

"When, therefore, the General Assembly undertook to confer the power to appoint the third election commissioner of Kansas City on a body of men not officially connected with the State government, it undertook in effect to create an office to exercise the governmental function of filling by appointment another public office and not only to create such office but to name by description the men who were to fill it, in effect creating the office and appointing the incumbents, making the law and executing it. Section 9, Article 14, gives no such power, and article 3 forbids it."

At page 696 the court said:

"The act of filling a public office by appointment is essentially an administrative or executive act, and, under the Constitution, can be exercised only by an officer charged with the duty of executing the laws. There is, however, an exception to this rule which does not conflict with the meaning of article 3. Courts and the General Assembly may appoint such officers or agencies, as are necessary to the exercise of their own functions. This power is essential as a right of self-preservation, and is necessary to preserve that very independence in the several departments of the government, which article 3 is designed to guard. (Nechem Publ Off., secs. 104 and 105.)"

In the Washburn case, supra, the Legislature enacted a law that one of the three election commissioners should "be chosen from three eligible citizens from the leading political party opposed to that to which" the other two commissioners belong. The court held that provision was not valid, on the ground it was an encroachment by the Legislature on the executive department. However, the facts of that case were not parallel to the facts of this case in that respect, because in the facts before us we are dealing with the authority of the court to approve its own officers and to fix their compensation.

It was further said in the Washburn case, and we grant that it was dictum and not necessary to be said in the decision of the case, that an exception to the rule exists, in that "Courts and the General Assembly may appoint such officers or agencies, as are necessary to the exercise of their own functions." They there state this inherent power is essential as a right of self-preservation and is necessary to preserve that very independence in the several departments of the government which the separation of power section of the Constitution is designed to guard and protect.

Mechem on Public Offices is likewise given as authority for the last above utterance, and such expression as last above made by the court appears to us to be sound and we have not seen it criticized in any later utterance.

In 15 C. J., page 871, par. 203, is this:

"The legislature may provide for ministerial officers with power to perform ministerial duties necessary in the administration of the law, and it is proper that the power to appoint such officers should be delegated to the courts. * * *"

In the same volume, page 873, par. 211, the law is thus stated:

"The right to compensation may rest upon the statute, or upon the inherent power of a court of record to appoint. * * *"

57 C. J., page 730, par. 1, declares the law to be that the sheriff "is an officer of the court and subject to its orders and directions."

11 C. J., page 848, par. 1, declares the law, with reference to the clerk, as follows:

"A clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records, etc. * * *"

Mr. Wayne T. Walker

-7-

We would prefer laying our fingers on a Missouri decision squarely deciding this question, but being unable to do so we rely upon the Washburn case and the authority there cited, the reasonableness of said view with reference to the inherent power of the court, the support given to said view by the law writers, and the inclination to follow what we believe to be our duty in upholding the constitutionality of statutes unless they appear to be clearly unconstitutional.

Conclusion.

It is our opinion that the statutes enacted by the recent Legislature, making the compensation and number of deputy circuit clerks and deputy sheriffs dependent upon the approval by the circuit judges of the courts in which said officials function, are constitutional.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

MOTOR VEHICLES: Use of truck ordinarily used in hauling commercially, and having only "local commercial license," for transporting farm products for distance of more than 25 miles, where such use not wholly within one municipality or urban community, violates Sec. 8369, Laws 1943, pp. 664-666, and subjects user to penalty prescribed.

August 29, 1946

FILED

93

Honorable Hugh H. Waggoner
Superintendent, Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for our official opinion on the following question:

"A Mr. _____ owns a lime quarry and a fleet of lime trucks. He has seven trucks with 'local' license and two licensed for 'beyond local.' Mr. _____ also owns and operates a large farm in another locality, and in the course of his operations he uses his lime trucks to transport farm products, equipment and implements to and from his farm to Canton and other parts of the state. Would he be violating the law if he used a truck with a 'local' license to transport farm products and equipment beyond the 25 mile limit?"

"Local" and "beyond local" license fees were introduced into the Missouri Statutes in House Bill 240 of the 62nd General Assembly, and may be found in Laws of 1943, beginning at page 663. In quoting pertinent sections from that law, as will be hereafter seen, frequent reference is made to "commercial motor vehicles," and the following is the statutory definition of that term, taken from Section 8367, R. S. No. 1939:

" * * * 'Commercial motor vehicle.' A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers. * * * "

Since, to properly transport lime, a vehicle must necessarily be included in that definition, we pass to that portion of Section 8369, Laws of Missouri, 1943, pages 664-666, which defines "local commercial motor vehicles":

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms."

The same section provides also that the fee for a "local" vehicle shall be only one-third the fee for those commercial vehicles not coming within the provisions just quoted, supra.

To be exempt from the payment of the full fee and obtain the benefits provided for "local" commercial motor vehicles, the truck mentioned in your request must be used in accordance with one of the four numbered subdivisions of Section 8369, quoted above, and the first three are eliminated by your question.

Under your request it is possible that the individual concerned is "principally" engaged in farming, since you state that he owns and operates a large farm, even though he also operates a lime quarry.

To come within the terms of subsection 4, supra, however, the vehicle must be "used exclusively in the transportation of agricultural products," and we can find no precedent for holding that commercial lime such as that produced by a quarry is such a product. Reference to "Words and Phrases - First Series" discloses the following definition (Volume 1, page 287):

"In ordinary usage, the term 'agricultural products' is confined to the yield of the soil, as corn, wheat, rye, hay, etc., in its primary form. * * * Davis vs. City of Macon, 84 Georgia Reports 128."

The word "exclusively" needs no definition here, as its meaning is too well known. A truck used in hauling lime from a quarry could not be used exclusively for the agricultural purposes contemplated in the statute quoted herein.

CONCLUSION

It is the conclusion of this office that the use of a truck, ordinarily employed in hauling lime commercially, and having only the "local commercial license" described in Section 8369, Laws of Missouri, 1945, pages 664-666, for transporting farm products, equipment and implements for a distance of more than twenty-five miles, where such use is not wholly within one municipality or urban community, violates the provisions of said Section 8369, and would subject such user to the penalty prescribed. -

Respectfully submitted,

ROBERT L. HYLER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:MR

MISSOURI STATE HIGHWAY
PATROL:



(1) Necessity of employees of the State of Missouri and of members of Patrol complying with motor vehicle drivers' regulations; and (2) applicability of Motor Vehicle Safety Responsibility Act to employees of the State of Missouri and to members of Patrol.

September 26, 1946

Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date requesting an official opinion of this office, and reading as follows:

"The Legislature recently passed House Bill No. 317, which is known as the 'Motor Vehicle Safety Responsibility Act.' We are in doubt as to the intent of the Legislature concerning the status of persons operating state-owned vehicles in performance of their duties, and of course, we are particularly interested in the status of members of the Patrol when operating patrol cars.

"We also would like to know what license, driver's, or registered operator's, if any, an employee of the State of Missouri must have, to legally operate a state-owned motor vehicle. Again we are particularly interested in what license our patrolmen need to operate a patrol car in performance of their duty.

"We ask that you inform us of your opinion on these questions as soon as you possibly can, as the law becomes effective October 6, 1946."

For reasons which will appear subsequently in this opinion, we have answered your question in inverse order, and have subdivided each question into its components.

We first consider the applicability of the motor vehicle drivers' licensing regulations with respect to employees of the State of Missouri. Section 8444, R.S. Mo. 1939, reads as follows:

"(a) It shall be unlawful for any person except those hereinafter expressly exempted to drive any motor vehicle upon any highway in this state unless such person has a valid license as an operator under the provisions of this article.

"(b) Any person holding a valid chauffeur's license or registered operator's license, as provided in Sections 8372 and 8373, need not procure an operator's license."

The exemptions mentioned in the statute quoted supra are set out in Section 8445, R.S. Mo. 1939, as reenacted Laws of Missouri 1943, page 662:

"The following persons are exempt from license hereunder:

"1. Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway.

"2. A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State only as an operator.

"3. A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State either as an operator or chauffeur, except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State.

"4. Any nonresident who is at least eighteen (18) years of age, whose home State or country does not require the licensing of operators, may operate a motor vehicle as an operator only, for

a period of not more than sixty (60) days in any calendar year, if the motor vehicle so operated is duly registered in the home State or country of such nonresident.

"5. Inmates of the Department of Penal Institutions selected by the Board and Warden who have not been convicted of a motor vehicle felony as follows--driving while intoxicated, failing to stop after an accident and disclosing his or her identity, or driving a motor vehicle without the owner's consent--may operate State owned trucks for the benefit of the Institution, provided, that such inmate operator shall be accompanied by a guard in the said truck."

The provision found as paragraph (5) of the exemption statute was added thereto at the first session of the General Assembly following the rendition of the opinion in Department of Penal Institutions et al. v. Wymore, 165 S.W. (2d) 618. In the opinion mentioned, the Supreme Court of Missouri had held that the Act was applicable to all state officers. In the course of the opinion, the following language appears, l.c. 620:

"The terms of the Act are broad enough to include state officers and they are not expressly exempted by the Act or by any other law. By Section 8374, Revised Statutes Missouri 1939, amended by Session Acts of 1941, page 446, Mo.R.S.A., Section 8374, the motor vehicle itself, when state or municipally owned, is exempted from registration and license, but there is no exemption as to the operator of the vehicle. On the contrary, that section expressly grants to municipalities the power to 'regulate the speed and use of such motor vehicles.' It is unlikely that the general assembly intended to grant to municipalities the power to regulate the operation of publicly owned motor vehicles and to deny that power to the state. The fundamental purpose of the Drivers' License Act seems to require the inclusion of state officers as well as other persons. There is just as much danger to the public in the operation of a state owned car as one which is privately owned. * * * *"

The fact that the subsequent action taken by the General Assembly had the effect only of relieving from the Missouri drivers' license law inmates of the Department of Penal Institutions selected by the Board and Warden, when operating state owned trucks under restricted conditions, is strongly indicative of the intent of the General Assembly to not further exempt other state employees. From the above we are persuaded to the view that employees of the State of Missouri are required to comply with the drivers' license law of the state. The particular type of license required--registered operator, chauffeur or operator--will, of course, be dependent upon the type of employment of such employees.

What has been said above we think equally applicable to members of the State Highway Patrol. However, we note that you have specifically requested our opinion as to the exact type of license such members should procure; and we, therefore, have extended our consideration of the matter to the end that this phase of your inquiry may be answered.

The following definitions found in Section 8443, R. S. Mo. 1939, we deem pertinent:

"(e) Operator. Every person, other than a chauffeur or registered operator, who is in actual physical control of a motor vehicle upon a highway.

"(f) 'Chauffeur'. An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire.

"(F-1) 'Registered operator.' An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

Giving due regard to the fact that State Highway Patrol members are not employed primarily to drive motor vehicles, but that such operation is an incident to the employment of those members of the Patrol who are assigned automobiles or

motorcycles, we believe that such operations are within the category of those to whom the definition of "registered operator" applies. We think that, therefore, the members of the State Highway Patrol whose employment is such as to require the operation of a motor vehicle as an incident of their employment must obtain a license as a "registered operator."

Having determined that the employees of the State of Missouri and the members of the Missouri State Highway Patrol must comply with the drivers' license law of the state, we next consider the applicability of the Motor Vehicle Safety Responsibility Act, which is found in House Bill No. 317 of the 63rd General Assembly to such employees of the state and to members of the State Highway Patrol. The Act by its terms applies to all owners and operators of motor vehicles. The only exemption clause found therein is paragraph (b) of Section 4, reading as follows:

"Notwithstanding anything else herein contained, this Act shall not apply with respect to any motor vehicle owned by the United States, the State of Missouri, or any political subdivision of this State, or any municipality therein, nor shall this Act apply to any common carrier or contract carrier whose operators are subject to the jurisdiction of and are regulated by the Interstate Commerce Commission or the Public Service Commission of Missouri, or by regulatory ordinances of the municipalities served by such common or contract carrier, and which shall have satisfied any applicable requirements concerning bond, insurance or proof of financial responsibility imposed by the regulatory authority having jurisdiction over the carrier's operations."

You will note that we have underscored a portion of the quoted exemption clause. We have done so for the reason that it might be contended that this portion would serve to exempt the drivers of such motor vehicles referred to therein from the operation of the Act. We do not believe that it has this effect, however, as reference to the Act itself discloses that the exemption clause follows immediately after paragraph (a) of Section 4, which reads as follows:

"The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action, as hereinafter stated."

Also, immediately following the exemption clause, we find paragraph (a) of Section 5, reading as follows:

"The suspensions required in Section 4 shall remain in effect and no other motor vehicle shall be registered in the name of such judgment debtor nor any new license issued to such person for the vehicle involved unless and until such judgment is satisfied or stayed and the judgment debtor gives proof of financial responsibility in future, as hereinafter provided, except under the conditions as herein stated in the next succeeding sections."

It is our belief that by reason of finding the exemption clause in juxtaposition to the quoted portions of the Act relating to the registration certificates of motor vehicles, the underscored portion of the exemption clause relates solely to those provisions. This would, of course, be but in accord with a practical application of the Act, as it would be an absurd action of the General Assembly to write a law which would have the effect of destroying the right of the State of Missouri to use its own motor vehicles merely because a driver thereof had suffered the loss of his right to operate a motor vehicle.

You will note that nothing contained in the quoted exemption clause has the effect of relieving employees of the State of Missouri or members of the State Highway Patrol from the provisions of the Act. In the premises, we believe that the cited portion of the opinion in Department of Penal Institutions et al. v. Wymore, 165 S. W. (2d) 618, 1. c. 620, quoted supra, to be applicable in the construction of the statute.

CONCLUSION

In the premises, we are of the opinion that:

(1) Employees of the State of Missouri are required to comply with the drivers' license law of the state, the particular type of license required being determined by the nature of the employment;

(2) Members of the Missouri State Highway Patrol are required to comply with the drivers' license law of the state, and in view of the nature of their employment and use of motor vehicles in connection therewith, the proper license being that of a "registered operator"; and

(3) The provisions of the Motor Vehicle Safety Responsibility Act, being House Bill No. 317 of the 63rd General Assembly, are applicable to employees of the State of Missouri, including the members of the Missouri State Highway Patrol.

Respectfully submitted,

WILL F. MERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:LR

DISPOSITION OF GAMBLING MONEY: When in possession of highway
patrol, said money may be retained
HIGHWAY PATROL: for evidence, but must be returned
after the criminal proceedings.

October 18, 1946

10-29
FILED

93

Honorable Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department which reads in part as follows:

"a. A group of officers observed a dice game through a window in which money was being used by the participants for approximately one-half hour period. During this time, each of the participants who was arrested was observed either taking money into his hand or paying out money from his hand as he handled the dice in the game. Such expressions as 'Shoot 20' and 'I didn't make it' were heard. This gambling was taking place upon an especially constructed table. When the officers concerned broke through the window and entered the place, the participants were observed putting the money and dice in their pockets. The officers seized this money and dice from the pockets into which they had observed the participants placing the same, and held said money and dice as evidence.

"b. Assuming that the seizure of the money and dice as evidence was legal search and seizure, and the participants were formally charged under a criminal proceedings, and furthermore that they claim said money as their personal property and requests its return to them, the following opinions are requested.

"(1) Whether or not such money confiscated as evidence, may, after the disposition of the criminal proceedings against participants who claim said money, be properly turned over to either the School fund or the General Revenue Fund of the County of Venue.

"(2) Whether such money seized as evidence comes under the provisions of the 'Fourth paragraph of Section 4173, R. S. Mo. 1939' or any other paragraph of said section."

As we interpret the factual situation in your communication, we assume that this money was confiscated for evidence as a result of a legal search and seizure, and that after criminal proceedings, the owners requested that said money be returned to them. You specifically asked if this money comes under Section 4173 R. S. Mo. 1939, which provides in part as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles hereinafter named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

"First--Any gaming table or gambling device prohibited by law."

The rest of this section deals with the seizure of illegal publications, illegal drugs and raw materials to be used in the manufacture of illegal material described in said section. It is noted that property described in this section is property that is inherently illegal in its nature. It does not include property seized for evidence which is merely being used in an illegal transaction. Therefore, it seems clear to us that money confiscated in a gambling game would not be subject to the provisions of this section.

After a careful search of the statutes of this state, we find no provision for the forfeiture of money to a county merely because it was seized as evidence in a gambling game. The general rule is to return property to the owner when seized for evidence. We quote from 47 Am. Jur., paragraph 49, page 530:

"It is generally the practice, where property comes into the possession of a court in aid of a criminal prosecution, to restore it to its rightful owner when it is no longer needed, if there is no dispute as to its ownership.* * *"

Hon. Hugh H. Waggoner

(3)

An analogous situation was presented in the case of State vs. Gambling Equipment, 40 P. (2d) 746, wherein the Supreme Court of Arizona stated at l. c. 747:

"* * * After Grayson pleaded guilty to maintaining or keeping a gambling house, or, in other words, when the property was no longer needed as evidence, what disposition should be made of it? Property taken under a search warrant is in custodia legis. Often, and we think it is generally the practice, where property has come into a court or magistrate's possession in aid of a criminal prosecution, it is restored to its rightful owner when no longer needed, if there is no dispute as to its ownership.* * *

It can readily be seen from the above quotations that if property is seized and is not intended for illegal use, then it should be returned to the rightful owner.

CONCLUSION

Therefore, it is the opinion of this department that money confiscated at a gambling game to be used as evidence should be returned to the owner after criminal proceedings.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

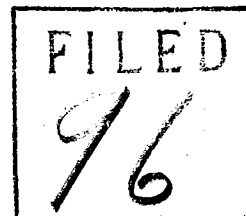
J. E. TAYLOR
Attorney General

PM:VLM

PENAL INSTITUTIONS: Sentences to different institutions
are cumulative and not concurrent.

January 9, 1946

1-25



Mr. Thomas E. Whitecotton,
Director Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Whitecotton:

In reply to your request to this office for an
opinion on concurrent or consecutive sentences as stated
in your letter, which is as follows:

"Attached are certified copies of
Sentence and Judgment relating to
the incarceration of James Rawles,
Algoa No. 5008, and Missouri State
Penitentiary No. 58350.

"This subject was sentenced on the
26th day of June 1943 to serve two
years in the Intermediate Reforma-
tory. While under sentence and
awaiting transportation to the Re-
formatory, he and one King attempted
to dig their way from the county jail.
They were apprehended and on the 18th
day of October 1943, were sentenced
to two years in the State Penitentiary.

"You will note that the Algoa commit-
ment reads 'that the said Defendant
having pleaded guilty as aforesaid,
be confined in the Intermediate Re-
formatory of the State of Missouri
for the period of two years, from
this date,'. The Penitenti-
ary commitment reads 'that the said
Defendant, James Rawles, having pleaded
guilty as aforesaid, be confined in the
penitentiary of the State of Missouri
for the period of Two years, from this
date,'.

"The question has arisen as to whether or not the Record Clerks at Algoa and the Penitentiary were correct in setting this inmate to serve the sentences consecutively. I might add that this subject was received at the Intermediate Reformatory October 26, 1943, completed his sentence, and was registered at the Penitentiary December 28, 1944, then was reassigned to Algoa as an inmate clerk in the Chief Clerk's office.

"Your official opinion is requested as to how these two sentences should run, whether concurrent or consecutive, and whether in your opinion it was the intention of the court that the latter sentence, that is, two years in the State Penitentiary without any indication as to how it would run, would supersede the two-year sentence to Algoa."

This question turns upon the interpretation of the two commitments, one being a commitment to the Intermediate Reformatory at Algoa for two years, and the other being a commitment to the penitentiary for a term of two years, by the same judge, in the same court, but at different terms.

The commitment to the Intermediate Reformatory at Algoa was made at the June Term, 1943, of the Circuit Court of Jasper County, Missouri, and reads as follows:

"BE IT REMEMBERED, That heretofore, towit: on the 26 day of June A.D. 1943, at the regular June Term of the Circuit Court, begun and held at the Court House in the City of Carthage in the County and State aforesaid, before the Honorable Wilbur J. Owen Judge of Division Two of the Twenty fifth Judicial Circuit of the State of Missouri, and Judge of this Court. The following among other proceedings were had, towit:

"STATE OF MISSOURI	Plaintiff)	
VS.)	No. 7838
James Rawles	Defendant)	

"Now, at this day comes the Prosecuting Attorney for the State, and also comes the Defendant herein, in person and in open Court, whereupon said Defendant is duly arraigned and informed by the Court that he stands charged upon the Information filed against him by the Prosecuting Attorney of Jasper County with the crime of Burglary and being now enquired of how he will acquit himself of said charge, for plea thereto the Defendant says he is guilty as charged in the Information. And thereupon the Court does assess his punishment at Two years imprisonment in the Intermediate Reformatory at Alcoa, of this State. And now being now asked by the Court if he has any legal cause to show why Judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court, that the said Defendant having pleaded guilty as aforesaid, be confined in the Intermediate Reformatory of the State of Missouri for the period of Two years, from this date, and that the Sheriff of this County shall remove and safely convey the said Defendant to the said Intermediate Reformatory there to be kept, confined and treated in the manner directed by law, and the Superintendent of said Intermediate Reformatory is required to receive and safely keep him, the said Defendant in the Intermediate Reformatory aforesaid until the Judgment and Sentence of this Court be complied with, or until said Defendant shall be otherwise discharged by due course of law. And that the State of Missouri have and recover of and from said Defendant the costs in this suit expended, and that execution issue therefore."

The commitment to the Penitentiary was made at the September Term, 1943, of the Circuit Court of Jasper County, Missouri, and reads as follows:

"BE IT REMEMBERED, That heretofore, to-wit: on the 18" day of Oct. A. D. 1943, at the

regular September Term of the Circuit Court, begun and held at the Court House in the City of Joplin, in the County and State aforesaid, before the Honorable Wilbur J. Owen, Judge of Division 2 of the Twenty-fifth Judicial Circuit of the State of Missouri, and Judge of this Court.

"The following among other proceedings were had, to-wit:

"STATE OF MISSOURI, Plaintiff,)	No. 10960
VS.)	Criminal
James Rawles, Defendant.)	Action,
	Sentence
	and
	Judgment.

"Now at this day comes the Prosecuting Attorney for the State, and also comes the Defendant herein in person and in open Court, whereupon said Defendant informs the Court that he will withdraw his plea of not guilty heretofore entered herein, and enter his plea of guilty to the crime of Attempting to Break Jail as charged in the information. And thereupon the Court does assess his punishment therefor at -- Two years imprisonment in the Penitentiary of this State. And being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him, according to law, and still failing to show such cause, it is therefore sentenced ordered and adjudged by the Court that the said Defendant James Rawles, having pleaded guilty as aforesaid, be confined in the penitentiary of the State of Missouri for the period of Two years, from this date, and that the Sheriff of this County shall remove and safely convey the said Defendant to the said Penitentiary, there to be kept, confined and treated in the manner directed by law, and the Warden of said Penitentiary is required to receive and safely keep him, the said Defendant in the Penitentiary aforesaid until the Judgment and Sentence of this Court be complied with, or until said Defendant shall be otherwise discharged by due course of law. And that the State of Missouri have and recover of and from said Defendant the costs in this suit expended, and that execution issue therefor."

Section 9108, R. S. Mo. 1939, reads as follows:

"An intermediate reformatory for young men, who for the first time have been convicted of a felony as hereinafter designated, is hereby established."

Section 9109, R. S. Mo. 1939, reads as follows:

"The intermediate reformatory for young men shall be under the management of the department of penal institutions, but it shall be established separate and apart from the Missouri penitentiary and also the Missouri training school for boys now located at Boonville."

Judge Leedy, in the case of Anthony v. Kaiser, 169 S. W. (2d) 47, 1. c. 49, states that the Intermediate Reformatory for Young Men at Alcoa, and the penitentiary, are separate institutions, in the following language:

"The act of 1927 by which the Intermediate Reformatory for Young Men was created expressly provided for its establishment 'separate and apart from the Missouri penitentiary * * *.' It is an institution 'for young men, who for the first time have been convicted of a felony.' Sections 9108, 9109, R. S. '39; Mo. R.S.A. Secs. 9108, 9109. But the inmates are convicts, and they are referred to as such in numerous sections of said act."

Section 465, p. 123, Vol. 15 Am. Jur., referring to concurrent and cumulative sentences, in part reads as follows:

"In those states where cumulative sentences are permissible and the subject is not con-

trolled by statute, if the accused is convicted of more than one offense or under more than one count, sentences of imprisonment imposed under the different counts or for different offenses, if by the same court, will be construed as running concurrently, and the accused will be discharged at the expiration of the longest term, unless the sentences expressly state otherwise or unless for other reasons (as that the imprisonment is in different places) it clearly appears that the court intended that the sentences should run consecutively, and not concurrently. If the court inadvertently fails to have the sentence recorded in such form as to show the imposition of a cumulative sentence or from leniency intentionally omits to add such a provision, and the defendant is committed in pursuance of such sentence and another or other sentences, he is either voluntarily released by the jailer or discharged on habeas corpus at the expiration of the longest term named in any one of the sentences. No presumption will be indulged in favor of sustaining a sentence as cumulative."

(Emphasis ours.)

Note in this citation that part underscored and enclosed in parenthesis.

Again, in the Anthony case, supra, l. c. 49, Note 5, Judge Leedy, in commenting upon the circumstances, makes mention that sentences to different institutions are cumulative and not concurrent.

In the case of Higlin v. Kaiser, 179 S. W. (2d) 471, at l. c. 471, 472, 473, Judge Tipton points out that dates fixed by the trial court are surplusage, as follows:

"* * * it may be laid down as a general rule, though not one without some exceptions, that any attempt on the part of the court to fix the beginning or end of a period of imprisonment is nothing more

than a mandate of execution, and, being merely directory, may be treated as surplusage. The fixing of such a date is ministerial and not judicial and, therefore, may be properly devolved upon an executive officer.' 15 Am. Jur. 109, Sec. 448.

" * * * * *

"From a review of the statutes and the authorities cited, we are of the opinion that any part of a judgment of record which shows that a sentence is to start at a date prior to the date of sentence (or the fixing of any date) is surplusage. * * * * *

"To hold otherwise, it would permit the will of the legislature to be thwarted by a trial court. For instance, a court could provide a date far enough in advance of the date of judgment to let the convicted person entirely escape punishment. Moreover, if the convicted person was at liberty on bond pending his appeal to an appellate court, he would not necessarily serve his full time, while a convicted person who did not appeal would serve his full sentence. The law and not the judgment fixes the date his punishment shall commence."

CONCLUSION

In view of the foregoing, it is the opinion of this Department that the two sentences above referred to are cumulative and that it was not the intention of the trial court that the penitentiary sentence should supersede the Alcoa sentence.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

GORDON P. WEIR
Assistant Attorney General

GPW:CP

COUNTY ASSESSORS: Compensation controlled by statute.

January 4, 1946

FILED

97

Honorable Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Williamson:

Your request of December 17, 1945, presents the following question:

Under the present statutes, and the New Constitution what compensation is a County Assessor entitled to for acts performed or service rendered?

A County Assessor is a public officer. Authority for that statement may be found in Corpus Juris, Volume 46, page 925, and especially the case of State vs. Montaya, 20 N. Mex. 104, 146 P. 956, which held a Deputy County Assessor to be a public official. Tax Assessors have been classified as public officials. McKay Radio & Telegraph Co. vs. Town of Cushing, 162 A. 783, 131 Me. 333.

Being a public officer, a County Assessor is entitled only to such compensation as is provided for by statute. See Nodaway County vs. Kidder, 129 S.W. (2d) 857, 344 Mo. 795, and Coleman vs. Kansas City, 173 S.W. (2d) 572, 351 Mo. 254.

Therefore, under the cases and rules announced therein, the County Assessor must show statutory authority before he is entitled to collect any compensation for services rendered or acts performed.

The effect of the Constitution of 1945, upon existing statutory provisions is found in the Schedule, Section 2, page 140, where the following is found:

Honorable Hugh P. Williamson

JAN. 4, 1946

"Sec. 2. Effect on Existing Laws.--
All laws in force at the time of the
adoption of this Constitution and
consistent therewith shall remain in
full force and effect until amended
or repealed by the general assembly.
All laws inconsistent with this Con-
stitution, unless sooner repealed or
amended to conform with this Consti-
tution, shall remain in full force
and effect until July 1, 1946."

CONCLUSION.

It is, therefore, the opinion of this office
that the County Assessor is entitled only to those
fees provided for by the statutes of Missouri. Fur-
ther, under the New Constitution only those laws ac-
tually repealed or amended, since the adoption of the
New Constitution, will affect the fees payable to the
County Assessor.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

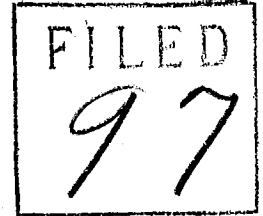
APPROVED:

J. E. TAYLOR
Attorney General

WCB:ir

COUNTY COURTS: RE: County courts have the power, duty and authority to examine into the facts and law upon which fee bills are based.

February 4, 1946



Judge J. W. Wight
Moberly, Missouri

Dear Judge Wight:

Your recent request for an opinion has been assigned to the writer for answer. Your question concerned the power of a county court to issue warrants for criminal costs, without auditing or examining said costs as to their being proper charges, after they have been prepared by the clerk and certified to by the judge and prosecuting attorney, may be answered by an examination of the Constitution and statutes relating to the general powers and duties of county courts.

The Missouri Constitution, Article 6, Section 36, provides that in each county there shall be a county court and said court, "shall have jurisdiction to transact all county and such other business as may be prescribed by law". Section 2480, Revised Statutes of Missouri, 1939, provides that "said (county) court shall have control and management of the property * * *, and shall have power and authority to purchase, * * *, and to audit and settle all demands against the county." The section of the statutes regarding a fee bill bearing upon the present question is, section 4237, Mo. R. S., 1939, providing for the duty of the judge and prosecuting attorney in certifying the fee bill to the county court.

In explanation of the above quoted sections of the statutes and the discussion as to the general powers and duties of the county courts we believe the Rose and Wehmeyer cases to be in point.

The case of State v. Rose, 281 S. W. 396 points out that although the legislature has the power to provide for the payment of fees out of the county treasury, it can not take away from the county court the right to call in question both the facts and the law on which the payment of such fees are demanded. The Supreme Court in regard to the powers and duties of a county court said at l. c. 397:

"The various provisions of the Constitution and statutes (articles 6, Sec. 36, Const. of Mo., and sections 2574 and 9560 R. S. Mo.

1919) demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine, audit, adjust and settle all accounts to which the county shall be a party, and to pay out of the county treasury any sum of money found to be due by the county on such accounts; in short, responsibility for the safety of public funds, the accuracy and honesty of accounts, and statements of officials, is imposed on the county courts.* * *(underscoring ours.)

The Rose case was reaffirmed in the case of State v. Wehmeyer, 113 S. W. (2d) 1031, the court said that part of the jurisdiction with which the county court has been invested has given them the power and duty of auditing and settling all demands against the county.

An analogy for the lack of conclusiveness upon the county court of certified fee bills may be found in the case of State ex rel. vs. Wilder, 196 Mo. 418, 95 S. W. 396. In that case the court held that a certified fee bill drawn under section 4239 Mo. R. S. 1939, is not conclusive upon the State Auditor, but is only prima facie evidence of the facts contained therein. By analogy, we believe that the fee bills certified to the county court under section 4237, Mo. R. S. 1939, are not to be considered as conclusive upon the county court, but are to be considered only as prima facie evidence of the facts and charges contained therein.

Under Section 4240, Mo. R. S. 1939, the case of State vs. Heege, 40 Mo. App. 650, is cited as authority for the conclusiveness of fee bills upon county courts. After careful examination of the case annotating the statute cited, supra, we believe that the opinion of the Missouri Court of Appeals meant, that for procedural purposes the acts of a County court were ministerial in order for mandamus to lie, and that the court did not actually hold that the County court had no discretion to exercise in regard to the auditing of fee bills for criminal costs.

CONCLUSION

It is our opinion that; (1) at most a properly certified fee bill is only prima facie evidence of the charges and facts contained therein and is not conclusive upon the county court;

Judge J. W. Wight

-3-

(2) and that the county court has the power, duty and authority to examine the items contained in such fee bill and to adjust those items found not to be in accordance with the law and facts.

Very sincerely yours,

WILLIAM C. BLAIR
Assistant Attorney General

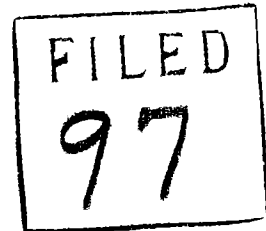
APPROVED:

J. E. TAYLOR
Attorney General

WCB:mw

INHERITANCE TAX: Exemption from Missouri Inheritance Tax of bequest to be used for establishing the "James L. and Nellie M. Westlake Scholarship Foundation."

March 28, 1946



Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Attention: Mr. C. L. Gillilan, Supervisor
Inheritance Tax Department

Dear Sir:

Reference is made to your request of recent date for an official opinion of this office, reading as follows:

"I am enclosing herewith copy of the will of the above named decedent, together with letter from F. Leland Carpenter, Clerk of the St. Louis City Probate Court, which accompanied the Inheritance Tax Appraiser's Report.

"You will note that under the provisions of items six and seven of the decedent's will, there is created a trust to be known as 'the James L. and Nellie M. Westlake Scholarship Foundation'. The net income from this trust is to be used for scholarships for the higher education for residents of Missouri, but may be expended in any educational institution in the United States.

"The Statute (576) exempts from Inheritance Tax transfers of this character to be used in this State.

"We will appreciate being advised as to whether or not, in your opinion, this exemption applies in this particular case. * * *"

The pertinent portions of the will of James L. Westlake, referred to in your letter, and under which the bequest for the creation of the "James L. and Nellie M. Westlake Scholarship Foundation" is made, read as follows:

"ITEM SEVEN: Upon the death of the last survivor of the beneficiaries named in Clause (4) (a), (b), (c) and (d), inclusive, of Item Six, the entire trust estate then in the hands of the Mercantile-Commerce Bank and Trust Company, including all Accumulated Income, shall thenceforth be held and administered by such Trustee perpetually for the charitable trusts, uses and purposes set out below:

"Said Trustee shall hold the principal of said trust estate in perpetuity as an Endowment Fund to be known as the 'James L. and Nellie M. Westlake Scholarship Foundation'. * * * *

"The net income from said trust estate, after provision for the reserve and the reasonable and necessary expenses as hereafter set out, shall be used for scholarships for the higher education of young men and young women resident in the State of Missouri who would otherwise be unable to obtain the benefit of such education in colleges, universities and professional schools located in the United States and approved by the Educational Committee hereafter constituted.

"Within one (1) year after the charitable trust estate hereby created shall have come into existence a permanent committee of three members shall be constituted called the 'Educational Committee of the James L. and Nellie M. Westlake Scholarship Foundation'. Within said period the President or other chief officer of the Trustee shall appoint as members of said Educational Committee, with the approval of Trustee's Board of Directors, three persons, one for a term of one year, one for a term of two years and the third for a term of three years, who shall be

persons who are in his opinion and in the opinion of said Board of Directors well qualified to perform the duties required of them hereunder and not members of the faculty or governing board of a college or university. In general, they shall be persons interested in the education of young people and with sufficient knowledge and experience to make appropriate selections of persons who are to be the beneficiaries of the Foundation hereby created and to approve the colleges, universities and professional schools at which such young people are to be educated. * * * * *

"At the end of the first calendar year within which the charitable trust hereby created shall have come into existence, or as soon thereafter as is practicable, and at the end of each subsequent calendar year, the Trustee shall advise the Educational Committee of the amount of income available for scholarships. Thereafter, the Educational Committee shall proceed to select young men and young women resident in the State of Missouri who are, in their opinion, by reason of their natural aptitude and intellectual ability, worthy of receiving scholarships and who except for the aid provided by such scholarships would be unable to obtain a higher education. * * * * *

"The Educational Committee shall also set out in said certificate the amount of money which is to be paid by the Trustee to each of those persons selected. The amount in each case shall be a sum sufficient to pay the tuition and the necessary maintenance and support of each beneficiary at the institution so selected and approved. The amount paid a beneficiary shall not be substantially in excess of the minimum amount required for the tuition, maintenance and support of a student at the particular institution selected, and the total of the amounts set out by the Educational Committee to be paid to all of those selected shall not exceed the amount which the Trustee has certified as being available for the purpose. * * * *

"The Trustee upon being advised of those selected for scholarships shall notify the persons so selected as beneficiaries of their selection and shall make available to each from time to time the amount of money certified by the Educational Committee as being the amount which the beneficiary is to receive, such money to be used by the beneficiary for tuition and his reasonable and necessary maintenance and support. The Trustee shall be absolved from any duty or liability in connection with the Committee's determination other than the duty to make the payments designated by the Committee. The Trustee shall not be liable for any diversion of the payments by any beneficiary. The money paid to the beneficiaries shall not be construed as loaned to them and they shall be under no legal obligation to repay the same. * * * * *"

Two statutes relating to exemptions from Missouri Inheritance Tax appear in the Revised Statutes of Missouri, 1939, namely, Sections 576 and 602. Section 576 reads, in part, as follows:

"The following shall be exempt from taxes provided for in this article: All transfers of property or any beneficial interest therein to be used, and actually used solely for county, city, town or municipal purposes, or for religious, charitable, or educational purposes in this state whether such transfer be made directly or indirectly and said property shall be exempt from the tax where the same descends from a trustee or trustees to other trustee or trustees who hold property for the uses of the above named institutions. * * * * *"

Section 602 reads as follows:

"When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any

church, or religious denomination in this state; to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members."

We are cognizant of the decisions of the Missouri Supreme Court holding that, under the provisions of these two sections, devises and bequests to educational institutions located outside the boundaries of the State of Missouri are not exempted.

In the case of Hall's Estate, 85 S. W. (2d) 621, the Supreme Court had for consideration the claim of exemption advanced on behalf of DePauw University with respect to a devise of real property, such University being located in Greencastle, Indiana. Such exemption was claimed under the provisions of Sections 575 and 602, R. S. Mo. 1929, now appearing as Sections 576 and 602, R. S. Mo. 1939. In disallowing the claim of exemption advanced under the first statute mentioned, the court adopted the opinion delivered in the Estate of Quirk, 257 Mo. 422, 165 S. W. 1062, saying:

"I * * * The general doctrine seems to be that prima facie the law should be held to have reference to persons and things within the territorial jurisdiction of the body enacting it, unless it clearly appears that another and different purpose should be gathered from the act itself. Presumptively the lawmaking power is acting in the interest of persons and things within the state. Presumptively the lawmakers in this case were looking after the interests of Missouri, and not legislating for charities in other states, and especially is this so when they were unloosing our own purse strings by this exemption clause. It means, if given the construction urged by the respondent, that a Missouri lawmaking body was releasing its hold upon a source of revenue for charities outside of the state. To give it that construction would, in effect, be to say that the lawmaking body was taking Missouri money to support foreign charities."

In further disallowing the claim of exemption under Section 602, the court said:

"We now consider section 602 (Mo. St. Ann. sec. 602, p. 370), as follows: 'When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state, to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members.'

"The pertinent parts of the section may be separated as follows:

"When any property * * * shall pass to or for the use of any * * * educational * * * purpose in this state, * * *'

"Or to any trustee * * * in this state, to be * * * actually held and used exclusively for * * * educational * * * purposes * * * the same shall not be subject to any tax.'

* * * * *

"The section under consideration is ambiguous. It is not a question of construing the section. It is a question of whether or not the transfer is clearly exempted by the section. We find no word or words therein clearly providing for an exemption of the transfer in question."

However, we believe that the bequest now under consideration is not one within the rules announced in the Hall case, supra. We have reached that conclusion by giving effect to the disposition to be made of the money to be expended by the Trustee upon the recommendation of the "educational Committee

of the James L. and Nellie M. Westlake Scholarship Foundation." Reference to the underscored portions of the will of James L. Westlake, set out supra, clearly discloses that all payments thereunder from the Scholarship Foundation Fund are to be made to persons resident of the State of Missouri to be used solely for educational purposes. The payments are not to be made to the educational institutions selected by the various recipients, which may or may not be located within the boundaries of the State of Missouri, but are to be made directly to the persons selected and are to be expended by them. That such was the intent of the testator is clearly indicated by the underscored provision relieving the Trustee from liability for any diversion of the funds after payment to such persons. Clearly, the entire scheme contemplates the entire matter be completed, if not necessarily within the State of Missouri, at least with persons who are residents of the state. We think that these provisions serve to fulfill the requirement that the exemptions provided in the statutes mentioned are for the protection of the State of Missouri and its residents, and are not to be used to allow the transfer of property to educational institutions in other states from which the citizens of Missouri derive no benefit.

We have searched for cases arising in other jurisdictions construing similar provisions incorporated in wills or trust instruments. We believe that the construction placed upon the trust instrument executed by Edward Bok declares with perhaps the greater conciseness the rules applicable to a consideration of the provisions of the James L. Westlake will. Under the terms of the Edward Bok trust agreement, provision was made for the delivery to the trustees of a large sum of money, to be expended by the trustees for certain purposes enumerated therein. Primarily, the trustees were to determine, at the end of each calendar year, what resident of Philadelphia had performed an act or rendered a service to the advantage of the city or its inhabitants as to be eminently worthy of public recognition and reward. Upon such determination having been made, the trustees were authorized to pay to such outstanding citizen the sum of \$10,000, together with the delivery of a suitable certificate or plaque embodying the facts surrounding such determination. In the alternative, and upon a determination having been made by the trustees that no citizen was worthy during the current calendar year of such public recognition and reward, the trustees were authorized to devote the current year's income from the trust fund for free scholarships for boys and girls resident in Philadelphia, the provisions with respect to the free scholarships being quite similar to those found in the James L. Westlake will.

The contention was made that the transaction was not of a charitable nature or for educational purposes. In discussing the contention so advanced, the Circuit Court of Appeals, 3rd Circuit, in Bok et al. v. McCaughn, 42 Fed. (2d) 616, said:

"It remains then to inquire whether the foundation is 'organized and operated exclusively for * * * charitable or educational * * * purposes, * * *' for, if so, undoubtedly the foundation meets the other test, viz., 'No part of the net earnings of which inures to the benefit of any private stockholder or individual.'

"Charity, derived from the Latin caritas, originally meant love. In the thirteenth chapter of first Corinthians the revised version uses the word 'love' in defining the third of the three cardinal virtues, which, in King James' version read 'Faith, Hope and Charity.' It was with similar emphasis on the motive which prompts action that Mr. Binney framed his approved definition of a charitable trust in his argument in the Girard will case: 'Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.' Vidal v. Girard's Executors, 2 How. 128, 11 L. Ed. 205 (1844) which is quoted by the Supreme Court in Ould v. Washington Hospital, 95 U. S. 311, 24 L. Ed. 450. Charity means such unselfish things as are wont to be done by those who are animated by the virtue of love. Thus the Supreme Court of the United States, following Chancellor Kent, Lord Lyndhurst, and Lord Camden, has defined a charitable trust as 'a gift to a general public use which extends to the poor as well as to the rich.' Perin v. Carey, 24 How. 506, 16 L. Ed. 701 (1860). So, also, Mr. Justice Gray speaking for the Supreme Court of Massachusetts in Jackson v. Phillips, 14 Allen 556 (1867) declared a charitable gift to be one 'for the benefit of an indefinite

number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.'

"It cannot be doubted that Mr. Bok's gift was a charitable gift as the word 'charitable' is used and understood by courts and lawmaking bodies. What he did was done for the love of his neighbors in the community which he had adopted as his home. Every activity recognized by the awards that have been made is an activity for the promotion of which a charitable trust might be created. A trust for popular education in music, or for making higher education accessible to the many, or for stimulating American patriotism by recalling the unselfish sacrifices of the fathers, or for the relief of human suffering, through new and improved surgical methods, or for the encouragement of craftsmanship, or for the beautification of a city, would be a charitable trust tested by any of the definitions which the authorities supply. And if a trust for the promotion of any one of these interests would be a charitable trust, it follows that a foundation to promote all of them is a trust that partakes of the nature of each. The making of an award to the citizen who renders conspicuous service in any field is one way (and an impressive one) to hold up that particular activity as an object of honorable effort and to encourage the many to follow in the train of the one thus conspicuously honored. Manifestly it was within the purpose of Congress, in granting this exemption, to encourage men and women to follow the examples of those whose well doing has made them the lights of the world in their several generations. In our judgment this court is giving effect to the intent of Congress when it holds, as we now do, that the disinterested gift of Mr. Bok for the good of his neighbors and for

the promotion of interests technically charitable and really educational is entitled as such to the exemption Congress meant to give." (Emphasis ours.)

CONCLUSION

In the premises, we are of the opinion that the bequest incorporated in the will of James L. Westlake to the trustees named therein for the purpose of establishing the "James L. and Nellie M. Westlake Scholarship Foundation" is a bequest for educational and charitable purposes, within the meaning of Sections 576 and 602, R. S. Mo. 1939, and that such bequest is exempt from Missouri Inheritance Tax.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Fire clay sold to a refractory not subject to sales tax.



May 18, 1946

Honorable Hugh P. Williamson
Prosecuting Attorney
Fulton, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"I would like to have your official opinion regarding the payment of sales tax in the following situations:

"(a) One A. D. Bridges owns his farm, has opened a fire clay pit on this farm and gets out fire clay from it which he delivers to the freight cars here in Fulton which take the fire clay to the Mexico Refractory. The refractory pays Bridges a certain amount per ton depending upon the kind and type of clay. Who pays the sales tax?

"(b) In this case Bridges leases land to be worked for fireclay. He opened a mine and works the mine. He pays the owner of the land \$.10 per ton for all fire clay which he gets out of the mine. Who pays the sales tax on the payment by Bridges to the owner of the land?

"(c) Bridges buys a mine for a lump sum and gets out the fire clay. Who pays on the lump sum which he paid for the mine?"

From the facts as given in your request we presume that the fire clay is sold for the purpose of being made into bricks which are then sold by the manufacturer, and that none of said clay is used by the manufacturer for his own use.

The General Assembly in 1937 enacted what is known as the "Sales Tax Act" (Laws of Mo., 1937, page 552; Article 24, Chapter 74, R. S. Mo. 1939), which act imposed a tax of two percent on the purchase price of every retail sale in this state of tangible personal property.

Section 1 of the Act (now Section 11407, R. S. Mo. 1939, as amended) defines "sale at retail" as follows:

"Sale at retail" means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace:

* * * * *

"

The statute does not impose a tax upon all sales of tangible personal property. The tax is imposed only upon sales "for use or consumption and not for resale in any form as tangible personal property." *Berry-Kofron Dental Laboratories Co. v. Smith*, 345 Mo. 922, 137 S. W. (2d) 452. As was said in *City of St. Louis v. Smith*, 342 Mo. 317, 114 S. W. (2d) 1017, l. c. 1019:

"It is clear from these statutory provisions that where one buys tangible personal property for his own use or consumption he is liable for the tax. On the other hand, it is equally clear that where one buys tangible personal property for the purpose of resale he is not liable for the tax. * * *"

In order to determine whether the transactions set forth in your request are sales for use or consumption or are sales for resale in any form, it must be first ascertained to what use the fire clay is to be put. "Fire clay" is defined in 11 C. J., page 832, as "the particular kind of clay used in the manufacture of fire brick." We do not believe it necessary to go into a lengthy discussion as to how bricks are

made or the part that clay plays therein because such matters are matters of general knowledge. (For exhaustive discourse, see 4 Ency. Brit. 111.) The definition of a "brick" as given in 9 C. J., page 416, and Webster's Dictionary will suffice. Said definition is as follows:

"A building and paving material made from clay, either pure or mixed, as with sand, lime, etc., by molding into blocks while moist and hardening in the sun or by fire; * * *"

It will be seen therefore that fire clay when sold to a refractory or a brick plant and there used and processed, becomes a substantial ingredient or component part of the finished product, i. e., bricks.

We find no case in Missouri dealing directly with this question. However, it is a well-established rule of statutory construction that a construction of a statute by those charged with the duty of enforcing it, while not binding upon the courts, is entitled to great weight. *Automobile Gasoline Co., v. City of St. Louis*, 326 Mo. 435, 32 S. W. (2d) 281; *Robertson v. Manufacturing Lumbermen's Underwriters*, 346 Mo. 1103, 145 S. W. (2d) 134.

The Rules and Regulations Relating to the Missouri Sales Tax Act, issued by Forrest Smith, State Auditor of Missouri, who is intrusted with the enforcement of said Act, at page 20 reads as follows:

" * * Sales of goods which, as ingredients or constituents, go into and form a part of tangible personal property for resale by the buyer are not taxable. * * *

* * * * *

"An illustration of a sale of tangible personal property which becomes an ingredient or constituent part of a finished product is as follows:

"Tangible personal property, such as flour, milk, salt, yeast, sugar and various other constituents, are pur-

chased by a baker who uses the same in the process of baking bread. These items enter directly into and form a part of a loaf of bread and their purchase is made for resale purposes by the baker. The final sale of the bread by him for use or consumption is the taxable sale."

In State v. Southern Kraft Corp., 3 So. (2d) 886, the Supreme Court of Alabama had before it the question of whether certain chemicals purchased by the Southern Kraft Corporation, a paper company, to be used in the manufacturing of Kraft paper, were subject to the Alabama sales tax. The facts as stipulated in said case were as follows, l. c. 887:

"All of the testimony in the case shows without dispute that the chemicals listed on Exhibit "A" to the stipulation, namely, salt cake, sulphur and lime, enter into and become a component part of Kraft pulp and that at least a part of said chemicals remain there and that salt cake, sulphur, lime, starch, hydrate of lime and chlorine, the chemicals or materials listed on Exhibit "A" to said stipulation, enter into and become a component part of Kraft paper when used in the appellant's processes of manufacture and remain there. In both instances the testimony shows that the presence of these chemicals in the finished articles is detectable by analysis."

Both sides conceded and the court agreed that the starch and the wood pulp entering into the manufacturing of the paper was not taxable. In regard to the chemicals, the court said, l. c. 889:

"* * * Therefore interpreting the act in the light of the established rule that taxing statutes are strictly construed against the taxing power and said arbitrary standards and definitions, the legislative intent apparently is that the uses of tangible personal property by

a manufacturer in manufacturing articles of tangible personal property, for sale, which are used with the intent and do in fact become a substantial ingredient or component part of the finished product, are non-taxable. This interpretation is supported by the practice of the Department of Revenue in treating the use of wood, which loses 80% of its substance in the process, as non-taxable; and the concession by the State Department that the use of starch is non-taxable, though it loses 20% of its quantity in the process of manufacture. * * *

The Supreme Court of Illinois in the case of Smith Oil & Refining Co. v. Department of Finance, 371 Ill. 405, 21 E. E. (2d) 292, held that core oil used in making cores in iron castings was subject to the sales tax because, (l. c. 294):

"* * * Before a commodity can be said to have been resold as an ingredient of the finished product, it must be shown to have been used with the intention that it should become a part of it, and not solely for some other and distinct purpose."

However, the court laid down the general rule as follows, l. c. 293:

"* * * If in the process of manufacturing, the core oil, in any form, becomes an ingredient or constituent of the iron castings, it is resold as tangible personal property and the vendor of the oil is not subject to the tax. But if, on the other hand, it is used merely as a part of the core around which the iron is poured, and no part of it becomes an integral part of the finished product, either as core oil or as carbon, it is not resold and the vendor of the oil is subject to the tax."

In view of the above authorities it will be seen that where a product is sold to a manufacturer, which product is to be used with the intent and does in fact become a substantial ingredient or component part of the finished product, that such a sale is not a sale at retail under the Sales Tax Act.

With this rule in mind, we will answer your questions in the order that they are set forth in your request.

(a) In view of the fact that the person in question sells the fire clay from his own pit to the Mexico Refractory, which in turn manufactures bricks from said fire clay, then such sale is not subject to the Missouri Sales Tax Act.

(b) A person who leases land which contains fire clay and mines said fire clay, paying to the owner a royalty on each ton so mined, does not have to pay a sales tax upon the royalty.

(c) A sale of a mine containing fire clay is not subject to the Missouri Sales Tax Act because said Act applies only to sales of "tangible personal property" and not to sales of realty.

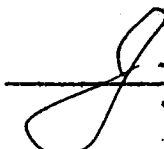
Conclusion

It is, therefore, the opinion of this department that a sale of fire clay to a refractory or brick plant, to be used in the manufacturing of bricks, is not subject to a sales tax thereon unless said bricks are manufactured by the refractory for its own consumption.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

AMO'K:EG

2 J. Smith
PROBATE COURT:

Probate judge entitled to fees which accrued last year of term, but not collected until 1947.

June 18, 1946
6-24

FILED
97

Honorable Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"The Probate Judge of Callaway County has inquired of me concerning the construction of a portion of the New Constitution which bears upon his office as Probate Judge and Magistrate. The New Constitution states that all fees collected by the Probate Judge and Judge of the Magistrate Court after January 1, 1947, shall go to the State Department of Revenue. The Probate Judge of Callaway County wants to know whether fees that are earned by him prior to January 1, 1947, but which are not collected until after January 1, 1947, go to him or whether they too must be turned in to the State Department of Revenue.

"I would greatly appreciate your consideration and opinion of this matter."

Section 2438, R.S. Mo. 1939, provides, in part, as follows:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters in every county.
* * * "

Honorable Hugh P. Williamson -2-

In view of the above provision we may take judicial notice that the term of office of every judge of a probate court in this State will terminate on December 31, 1946. State ex rel. Donnell vs. Searcy, 152 S.W. (2d) 8, 347 Mo. 1052.

The Constitution of Missouri, 1945, recently adopted, provides in Section 24, Article V, as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. * * * *
The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries. "

At the time that the above Constitution was adopted (February 27, 1945) probate judges of counties of the size of Callaway County were paid upon a fee basis. (Callaway County is shown by the last Federal census to have a population of more than 19,000, and, therefore, is not affected by the Bill passed by the 1943 Legislature affecting counties with less than 19,000 population.)(Laws of Missouri, 1943, page 868.) Such fees are fixed by Section 13404, R.S. Mo. 1939, which reads, in part, as follows:

"* * * * that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate

from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. * * * * *

It will be seen, therefore, that under said Section 13404, such judge was allowed to retain annually out of fees collected (except non-accountable fees) an amount equal to the pay of the circuit judge, exclusive of the circuit judge's traveling allowance. He was entitled to receive out of fees collected after the end of his term but which had been charged for services rendered by him during his term, an amount equal to the compensation of the circuit judge. In addition to this, if the fees collected after his term of office ended, exceeded the amount of compensation he was allowed to retain, he was entitled to an additional 10% of any such surplus. All other fees were required to be turned into the county treasury.

The principal case in Missouri relating to the fees of probate judges is Smith vs. Pettis County, 136 S.W. (2d) 282, in which the history of the probate judge's

fee statute is reviewed and said statute construed. The Supreme Court of Missouri, through Judge Douglas, l.c. 287, said:

"The fees collected by probate judges are of public record. We must assume that the legislature was familiar with them when they adopted these provisos. We may also assume that the legislature was familiar with probate practice in a general way. For instance, that estates could not be finally settled until after a lapse first of two years and now of one year. Where there is litigation estates remain open for indefinite periods. Estates of minors under guardianship may remain open for almost twenty-one years; estates of insane persons much longer. Therefore, the collection of fees previously earned may be long postponed. It would be and is unlikely that sufficient fees could be collected in the first years or perhaps during the entire four years of the term to reach the amount allowed. Moreover, a probate judge is specifically prohibited by this same section from collecting fees in advance. Before the limitation of these provisos was imposed probate judges would continue to collect fees long after the expiration of their terms. These matters all must have been considered. This court itself has judicially noticed the delays which ensue between the time a circuit clerk earns his fees and his actual collection of them in State ex rel. Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106.

"No doubt because of such delays the fees permitted to be retained were not restricted to those collected during the term. However, by this second proviso the amount to be retained after the expiration of the term was also limited. Under its terms read in their

ordinary meaning a probate judge is entitled to all his fees collected after his term until in the aggregate the amount of such fees reaches the amount of the annual compensation of the circuit judge--in this case \$4,700. After he has once collected such an amount then all excess (less ten per cent thereof) is to be turned over to the county. But, it is argued, this construction would give a probate judge salary for five years although his term is limited by the constitution to only four years. This contention is not tenable because, as we have pointed out, these provisos in no way increase the grant of fees already made but merely impose a limitation.

* * * * *

"* * * * *
A probate judge may only collect fees for services which he has already performed. These services may be performed only while he is in office. His fees can accrue only while he is in office. These provisos only limit what he may keep. We said in Corbin v. Adair County, 171 Mo. 385, 71 S.W. 674, that a circuit clerk can demand and recover his uncollected fees from his successor. A suit for fees against a clerk's successor was upheld in Lycett v. Wolff, 45 Mo. App. 489."

It will be seen that the court holds that, after the expiration of the term, a probate judge is entitled to all accrued fees up to the amount of the salary of a circuit judge, and he receives such fees even if they are collected after the term has expired. This reasoning is in line with that advanced in Givens vs. Daviess Co., 107 Mo. 603, in which the court said, l.c. 610:

"* * * Every day he held the office the law vested in him a right to a due proportion of the salary, as at that time fixed, and, consequently,

an order changing the compensation could not have a retrospective operation and divest from him what was his already. * * * ".

The case of State ex rel. McKittrick vs. Bair, 333 Mo. 1, which holds that a tax attorney employed by a county is not entitled to any fees until they are collected, may be differentiated from the instant situation, because in that case the statute under which the attorney was employed specifically provided that the fee was to be taxed and collected as cost, and that said attorney was to receive no fee or compensation except as therein provided. As the court pointed out:

"* * * 'It is clear, then, that unless the proceeding result in collecting a sum of money belonging to the public revenue, neither the collector nor his attorneys can claim any costs in the cause.' * * * ".

Applying the above holdings to the facts as presented in your request, it will be seen that Section 24, Article V, provides that: "Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law." And, further, "no judge's salary shall be diminished during his term of office." Under the holding in Smith vs. Pettis County, supra, the probate judge is entitled, as a part of his compensation, to all fees that have accrued during his term but which have not been collected until the expiration of his term up to the amount of the pay of a circuit judge. Therefore, even though under the new Constitution all fees of probate judges after January 1, 1947, are to be turned into the treasury such provision does not apply to the accrued fees, because it is part of the compensation of the probate judges during "their present terms" and to hold otherwise would be to diminish their salary during their term of office.

CONCLUSION.

It is, therefore, the opinion of this Department that the Probate Judge of Callaway County is entitled to

Honorable Hugh P. Williamson -7-

collect and retain for his own use, after his present term of office has terminated, any fees which were earned or accrued prior to the termination of his present term of office up to the amount of the Circuit Judge's salary, less the traveling allowance of said Circuit Judge.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir

SHERIFFS:

CONSTITUTIONAL LAW: RE: Under the new Constitution and the present law the sheriffs of the counties of the state may succeed themselves in office.

August 19, 1946



Representative Charles A. Witte
116 East Monroe
Kirkwood 22, Missouri

Dear Mr. Witte:

We are in receipt of your letter requesting an opinion of this office, which letter reads as follows:

"Please furnish me with an opinion on whether an incumbent sheriff, elected in 1944 and whose term will expire in 1948, can, under the new Constitution and the present law, succeed himself or become a candidate for that office."

Article IX, Section 10 of the Constitution of 1875 reads, in part, as follows:

"Sec. 10. Election of sheriff and coroner.-- There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period.
* * *"

This constitutional provision limited a sheriff to only one term at any one period. There is, however, no such provision in the Constitution of 1945.

There is to date no statutory provision which would limit any sheriff to one term at a time. The bill which is the authority for the office of the sheriff in the counties of the state is House Bill No. 683, passed by the 63rd General Assembly and approved by

the Governor. We enclose a copy of this bill for your examination. You will readily note that there is no prohibition on a sheriff succeeding himself in office in this bill.

Furthermore, Section 13126 R. S. Mo. 1939, reads as follows:

"Re-elected, must give new bond.--Should any sheriff be re-elected, he shall give a new bond and security within fifteen days from his election; and should he fail to do so, his former sureties shall not be held liable for any business done by him after the fifteen days expire."

This section has not been changed by any new bill passed with this session of the Legislature. It indicates that there is no such prohibition regarding a sheriff succeeding himself because the provision relates specifically to a sheriff who is "re-elected".

CONCLUSION

It is, therefore, the opinion of this department that an incumbent sheriff, elected in 1944 and whose term will expire in 1948, can succeed himself under the new Constitution and the present law.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

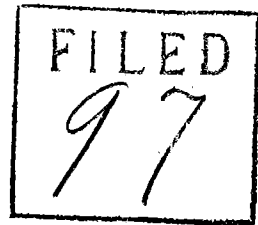
J. E. TAYLOR
Attorney General

SNC:mw
Enc.

Mr. John

SCHOOLS: Organization of common school districts into city, town or village districts.

November 7, 1946



Honorable Jay B. Wilson
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the following statement of facts:

"In Platte County, Missouri, in an 8th grade rural school District, (I probably should have said within the aforesaid school district) in a thickly populated part of the same, there has been, within the last two or three months, this thickly settled part has been incorporated as a village containing about 240 acres in area and a valuation of about \$90,000.00. Fourteen of the twenty-three pupils now enrolled in said District are from the aforesaid incorporated village. The valuation of the whole district, including the aforesaid incorporated village is \$370,000.00.

"So, the question is, does the fact that the incorporation of the aforesaid village remove or change the relation of the said village to said school district in the matter of taxation and so forth. In other words does it remove or take away this village from said school district for all purposes?"

It appears from this request that the population of the common school district has so increased that a village has been incorporated within the boundaries of the district and that the question arises as to whether or not the incorporation of the village in the common school district would automatically change the common school district to that of a village or city district.

I note from your letter that you particularly refer to the question as to whether or not this would affect the matter of taxation of property in the district. It will be

assumed that you refer to the matter of school taxes. Section 10323 R. S. Mo. 1939 relates to the classification of school districts in this state, and it reads as follows:

"The public schools of this state are hereby classified as follows: First, all districts having only three directors shall be known as common school districts; second, all districts outside of incorporated cities, towns and villages, which are governed by six directors, shall be known as consolidated school districts; third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts, and fourth, all districts in which is located any city of the first, second or third class shall be known as city school districts."

It appears from your letter that the district, as it now exists, comes within the classification of a common school district with three directors. The fact that a part of a common school district is incorporated into a city or village does not automatically change the common school district or any part of it to a city or village district. The procedure for organizing a city or village school district out of a common school district is set out in Section 10467 R. S. Mo. 1939, which reads as follows:

"Whenever it may be desired to organize a common school district or consolidated school district into a town or city school district, with special privileges granted under this article, the board of directors shall, upon the reception of a petition to that effect, and signed by ten qualified voters who are resident taxpayers of the district, submit the proposition at an annual or special meeting, giving notice of such meeting as provided by section 10418. The order of business at such meeting shall be as follows:

"First--To organize as a town or city school district, those voting for the organization shall have written or printed on their ballots 'For organization,' and those voting against the organization shall have written or printed on their ballots 'Against organization;' and each person desiring to vote shall advance to

the front of the chairman and deposit his ballot in a box to be used for that purpose. When all present shall have voted, the chairman shall appoint two tellers, who shall call each ballot aloud and the secretary shall keep a tally and report to the chairman, who shall announce the result; and if a majority of the votes cast are 'for organization,' the chairman shall call the next order of business.

"Second--To elect six directors, as follows: Two shall be elected for three years, two for two years and two for one year, and each director shall be elected separately and the result announced in the manner prescribed for organization. If said election is held at a special meeting, from then until the next annual meeting shall be taken as one year, so far as relates to the terms of the directors elected. The directors chosen must comply with the requirements of section 10470 of this article. The chairman and secretary of such meeting shall keep a record of the proceedings thereof and turn the same over to the board of education of such district, to be entered upon its records by the clerk of such district."

The case of State ex rel. School District of Affton vs. Smith, State Auditor, 80 S.W. (2d) 858, was before the Missouri Supreme Court on the question of registration of the bonds of a town school district which was supposed to have been organized from a common school district. In that case, the court refused to issue a writ of mandamus requiring the State Auditor to register the bonds of this district because the record failed to show that the school district which desired to issue the bonds had followed the procedure prescribed in Section 10467 for the organization of town or city school districts out of common school districts.

On the question of taxes to be levied and collected in the various school districts of the state, we find that Senate Bill 208, passed by the 63rd General Assembly and approved on January 25, 1945, re-enacted what was formerly Section 10347, and said Section as re-enacted reads as follows:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the

County Superintendent of Schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

By Section 10395 of said Senate Bill, the duties of the county clerk, with respect to assessing of the school taxes, are provided as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes; Provided, the levy thus extended shall not exceed in any one year the following rates on the hundred dollars assessed valuation; for sinking fund, forty cents; for interest fund, the number of cents necessary to produce the amount required to pay the interest on the bonded debt of the district; for other funds, eighty-nine cents in the City of St. Louis, one dollar in other districts formed of cities and towns, sixty-five cents in all other districts, and such additional rate or rates in each case as may have been legally authorized by the qualified voters of the district; all of which shall be extended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county

clerks shall list the names of all persons owning any personal property who do not reside in any school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of sixty-five cents on the hundred dollars valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in Section 10390; and it shall be the duty of the county assessor in listing personal property to take the number of the school district in which the taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose." (Emphasis ours.)

It will be noted by this section that the duty of listing personal property to the number of the school district in which a taxpayer resides at the time of making the list is imposed upon the county assessor. Under this section, when the assessor of the county lists the personal property of the taxpayers residing in the common school district, which includes the incorporated village, it is his duty to list the property of the residents of the district in the common school district. Such residents then would pay school taxes on the rates extended for that common school district. From the foregoing provisions of the statutes, it will be seen that the incorporation of a portion of a common school district into a village district does not change the status of the incorporated portion of such common school district to that of a village or town district until the residents of the district have followed the procedure prescribed by Section 10467 R. S. Mo. 1939 hereinabove set out.

CONCLUSION

Therefore, it is the opinion of this department that the fact that a village is formed in a common school district does not take away the status of the taxpayers of such village for paying school taxes to the common school district until such village is incorporated into a town or village district as is prescribed by Section 10467 R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

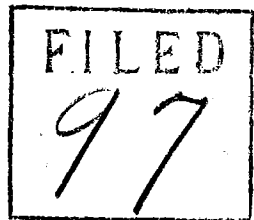
TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
Attorney General

THUR. MAR.

COUNTY BUDGET: Surplus in classes 1, 2 and 4 may be transferred to class 5 to be used as contingent and emergency expenses of the county.

November 21, 1946



W. J. Smith

Honorable David W. Wilson
Prosecuting Attorney
Lewis County
La Balle, Missouri

Dear Sir:

This is in response to yours of recent date wherein you request an official opinion from this department on the following statement of facts:

"Lewis County has a surplus in class 1, 2, 4 and 5 county funds. They also have a debt for road equipment which debt was contracted in 1946. If it is proper, it is the desire of the County Court to amend the budget by taking some of the surplus in class 1, 2, 4 and 5 county funds and creating a contingent fund in class 5. It is their desire to pay on the debt for road equipment from the proposed contingent fund in class 5."

I note from your request that the county has a debt for road equipment which was contracted for in 1946, and it is proposed to transfer surpluses in class 1, 2, 4 and 5 of the county funds to a contingent fund in class 5. For the purpose of the opinion, we are assuming that the indebtedness for this road equipment is not in violation of section 26 (a) of Article 6 of the Constitution of 1945 which reads as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

The County Budget Act was originally enacted in 1933 by the Missouri General Assembly (Laws of Mo., 1933, page 340). Under section 2 of the Act as originally passed, entitled

"Classification of Expenditures of Counties," class 5, thereunder reads as follows at l.c. 342:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Then under section 5 of said Act, entitled "Classes of Expenditures," we find that class 5 of said section provided as follows:

"Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown."

As the Act was originally passed, there was no provision made for transfer of moneys from one class of expenditures to another. These sections remained as originally enacted until 1941 when the General Assembly amended class 5 of expenditures and estimates (Laws of Mo., 1941, page 650) which now may be found in Volume 22, Mo. R. S. A., sections 10911, 10914. Class 5 under section 10911, as amended in 1941, reads as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Class 5 of section 10914, as amended, reads as follows:

"Contingent and emergency expense.--The county court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the court proposes the funds in this class shall be used, shall be shown."

It would appear from the amendments of the Budget Act, made by the General Assembly in 1941, that that body recognized the fact that the Budget Act, as originally passed, made no provision for transfer of surplus funds in cases where valid obligations existed against the county at the end of the year, and which could be paid if the surplus in a class could be transferred to a class from which such obligations might be paid.

It will be noted that the Act, as amended, provided that the surpluses transferred to class 5 were to be used as contingent and emergency expenses. The term "contingent expense" is defined in 17 C. J. S. at page 183 as follows:

"Expenses that are possible or liable, but not certain, to occur; expenses unknown and uncertain and which may or may not be incurred hereafter; expenses happening from unseen causes, or subject to unforeseen conditions; unexpected, casual, or incidental expenses. The term sometimes is used also as meaning general or miscellaneous expenses, rather than expenses which are uncertain or unforeseen.* * *"

If the debt for the road equipment to which you refer in your letter was not contemplated at the time the budget was made up, then we think such a debt would be considered as a contingent expense as hereinabove defined. However, I note from your letter that you state that if the county court is authorized to transfer these funds that the court desires to pay on the debt for road equipment from the proposed contingent fund.

As stated above, we are assuming that the total debt incurred is within the constitutional limit. That is, that it, together with other obligations of the county, payable out of county revenue, does not exceed the revenue for the current year. Of course, if the current expenditures of the county, out of county revenue, plus the indebtedness incurred for the road equipment, exceeds the income and revenue provided for this year, plus any unencumbered balances from

previous years, then the debt would be void and you would not be authorized to pay any part thereof, even though you were authorized to transfer funds to class 5.

In the case of State ex rel. Christian County vs. John P. Gordon, State Auditor, 265 Mo. 131, the court, in discussing the limitations of the Constitution on counties incurring debts, said at l.c. 138:

"* * * In Book v. Earl, 87 Mo. l.c. 252, it was said that the unmistakable purpose of section 12 of article 10 of our Constitution is to force counties to transact their business on a cash basis, and not incur debts to be paid after the year in which such debts were created. The doctrine of that case has been cited with approval many times. * * * This seems to be the only fair and logical construction of our organic law. The fact that the Constitution itself speaks in such plain terms renders an evasion of its words or intent impossible, however much we may wish to see relator and other municipalities similarly situated permitted to borrow money to make public improvements."

CONCLUSION

From the foregoing, it is the opinion of this department that the county court may transfer surpluses in classes 1, 2, 4 and 5 of the county funds to a contingent fund in class 5 of the budget to pay contingent and emergency claims, provided such claims are valid obligations of the county.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General.

TWB:VEM

CONSTITUTION: Requirement of title.
LEGISLATURE :

March 12, 1946



Honorable Charles A. Witte
House of Representatives
Jefferson City, Missouri

Dear Mr. Witte:

This acknowledges your request, which is as follows:

"I am hereby requesting an opinion on the validity of the bill having been offered and passed with an emergency clause shown in the body of the bill but not shown in the title of the said bill."

Your inquiry evidently is directed toward the validity or invalidity of the emergency clause where the bill, as finally passed, carries an emergency clause but the title does not mention or include the emergency clause. The 1945 Constitution of Missouri, Section 23 of Article III, provides:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

Section 28, Article IV of the 1875 Constitution, provides:

"No bill * * * shall contain more than one subject, which shall be clearly expressed in its title."

Section 29, Article III of the 1945 Constitution, defining when laws become effective, provides as follows:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

The 1875 Constitution, Section 36, Article IV, provided:

"No law passed by the General assembly * * * * shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct: * * * *"

We do not find where the exact question you ask has been passed on by the Supreme Court of this state, however many cases are reported in which the validity of the law is attacked on the ground that the title is defective. Those cases arose during the time the 1875 Constitution was the organic law, but as substantially the same provision is contained in Section 23, Article III of the 1945 Constitution, as is contained in Section 28, Article IV of the 1875 Constitution, with reference to the title, the construction of the 1875 Constitution on that subject would seem to control the construction of substantially the same provision in the 1945 Constitution, found in Section 23, Article III thereof.

The Supreme Court of this state in many cases has announced that the title section of the Constitution shall be liberally construed. The object and purpose of the constitutional provision being to require that the title to the bill shall be of assistance to the members of the Legislature in determining their action on the bill in question. The title must not be confusing, nor shall it contain more than one subject matter, and any effective part thereof must be germane to the subject matter dealt with in the body of the bill. The title need not be necessarily tedious or prolix, but it must be a true and certain guidepost indicating what the body of the bill is about. Cases throwing light on the meaning of the above constitutional limitation contained in Section 23, supra, are mentioned here below.

In the case of St. Francis Levee District v. Dorroh, reported in 316 Mo. 398, l.c. 413, the opinion recites as follows:

" * * * * It is urged that the bill or statute here in question contains more than one subject and that the subject-matter of the bill is not clearly expressed in its title; that no mention is made in the title of said bill as to penalties, fines, or interest for non-payment of levee taxes. The section (Sec. 4618, R.S. 1919) of the statute prescribing the penalty is a part of a bill enacted by the Legislature at the regular session of 1913 (Laws 1913, p. 290 et seq.), the title of which bill reads: 'An act to repeal article 9 (entitled "Organization of levee districts by circuit courts") of Chapter 41 (entitled "Drains and levees") of the Revised Statutes of Missouri of 1909, and to repeal an act amending and adding to said article 9, enacted in 1911 and found on pages 231 and 239, inclusive, of the Laws of Missouri of 1911, and all sections therein by whatever designation, and to enact a new act in lieu thereof, to be known as article 9 (pertaining to the organization of levee districts by circuit courts) of said chapter 41, with an emergency clause.'

"In State v. Mullinix, 301 Mo. 385, an act, the title of which was equally as general as that of the act now under

review, was ruled not to be violative of the constitutional requirement above cited. In that case, we said: 'The generality of a title will not affect its validity where it does not tend to cover up or obscure legislation which is in itself incongruous. A requisite to congruity is that the amendatory act shall pertain to and admit of being made a consistent part of the law to be amended. The disposition of the courts has always been to avoid thwarting the efficiency or evident salutary effect of legislative action by a liberal interpretation of the constitutional provision. (Burge v. Railroad, 244 Mo. 76; Booth v. Scott, 205 S.W. (Mo.) 633.) With this end in view it has frequently been held that a numerical reference, as in the case at bar, to the section sought to be amended without a statement of the subject-matter of the amendatory act, is a sufficient title to an act which deals exclusively with the subject of the section to be amended. The following cases are illustrative of this ruling: State ex rel. v. County Court, 128 Mo. 440; State ex rel. v. Heege, 135 Mo. 112; State ex inf. Hadley v. Herring, 208 Mo. 1.c. 722; State v. Murray, 237 Mo. 1.c. 166; State ex rel. v. Imel, 242 Mo. 1.c. 303; State v. Melton, 255 Mo. 1.c. 180; Ex parte Hutchens, 246 S.W. (Mo.) 1.c. 188; Asel v. Jefferson City, 287 Mo. 1.c. 204; McCue v. Peery, 293 Mo. 1.c. 234.'

"In State ex rel. v. Roach, 258 Mo. 1.c. 558, we said, en Banc: 'If we are not to offend by muddy prolixity, it would seem that when the general purpose of an act is clearly set forth in its title, then all ancillary matters, germane to and not inconsistent with the general purpose and which are necessary, or necessary details, in order to carry out and give life and effect to such purpose, and without which its purpose would fail, are to be read by necessary implication into the title of the act.'

"In *Ferguson v. Gentry*, 206 Mo. 1.c. 198, we said: 'We do not underrate the importance of this clause of our Constitution; its purpose is unmistakable and its tone is mandatory, but it must not be given a construction which would hamper the Legislature in a faithful and intelligent effort to embrace in one act a subject containing different features but all pertaining to the same legislative purpose. (*State v. Doerring*, 194 Mo. 410.)'

The title of the act in question clearly indicates that the general purpose of the act is to repeal Article 9 of Chapter 41 of the Revised Statutes of 1909, pertaining to the organization of levee districts by circuit courts, and an act of 1911 amendatory of said article, and to enact a new act in lieu thereof, to be known as Article 9 of said Chapter 41. The subject of the act, in our opinion, is single, and, while the title is general in expressing the purpose of the act, it cannot be said to be misleading, and it would appear, from a reading of the act in its entirety, that the section imposing a penalty for non-payment of levee taxes when due is ancillary, germane to, and not inconsistent with, the single subject and general purpose of the act, which is to provide a comprehensive law respecting the organization, support and maintenance of levee districts organized by circuit courts."

In *State v. Mullinix*, 301 Mo. 385, it was held that the title was sufficiently comprehensive to authorize the insertion in the body of the act of a section making it unlawful to "possess" intoxicating liquors, although the word "possess" does not expressly appear in the title of the act of 1921 or in the title of the act which it attempts to amend. The Supreme Court, speaking of the meaning of the above title section of the Constitution, said at 1.c. 389:

" * * * * The meaning of the provision, often repeated, is, that a title is suf-

ficient which indicates in a general way the contents of the act. (State ex rel. v. Roach, 258 Mo. 541; State v. Hurley, 258 Mo. 275.) A constitutional restriction upon legislative action similar in its material features to that under review is found in the Constitution of 1865 (Art. 4, Sec. 32). The rule of construction referred to was held applicable to this section. There has been no variance from this ruling in construing the like provision in the present Constitution. (Ensworth v. Albin, 46 Mo. 450; In re Burris, 66 Mo. 442; State v. Brassfield, 81 Mo. 151; Lynch v. Murphy, 119 Mo. 163; State v. Cantwell, 179 Mo. 245; State v. Doerring, 194 Mo. 398; State v. Wortman, 213 Mo. 131; State ex rel. v. Vandiver, 222 Mo. 206; Asel v. Jefferson City, 287 Mo. 195; Ex parte Karnstrom, 249 S.W. 595.)

"The generality of a title will not affect its validity where it does not tend to cover up or obscure legislation which is in itself incongruous. A requisite to congruity is that the amendatory act shall pertain to and admit of being made a consistent part of the law to be amended. The disposition of the courts has always been to avoid thwarting the efficiency or evident salutary effect of legislative action by a liberal interpretation of the constitutional provision. * * * *"

In State ex rel. Sekyra v. Schmoll, 313 Mo. 693, the Supreme Court, en banc, construed the same section and upheld the validity of the bill where the title to the same stated that it was an act to repeal three named sections of the Revised Statutes relating to public notices and advertisements in cities of more than 100,000 inhabitants and to enact in lieu thereof three new sections relating to the same subject, notwithstanding the charge that it was defective and failing to say that the act repealed the law relating to publications in cities of more than 600,000 population. One of the three sections repealed related to publication contracts in cities having 600,000 inhabitants or more. The court, at l.c. 706, said:

"The one subject here relates to legal publications in cities of over 100,000, and the statute repealed relates to that. The Constitution does not require each subdivision of the subject and details germane to the general purpose of the act to be mentioned in the title. (State ex rel. Greene Co. v. Gideon, 277 Mo. 361.) When certain sections of the statute are repealed and other sections enacted in lieu thereof, we do not understand that the Constitution is violated if the new section fails to deal with all the matter contained in the law repealed. If there is included a different matter not in the law repealed, there might be some ground for the objection."

In State ex rel. Faust v. Thomas, 313 Mo. 160, the title was held good, and the court said at l.c. 166:

"The title to which this objection is made is as follows:

"An act to repeal Section 5089 of Article 15 of Chapter 30 of the Revised Statutes of Missouri, 1919, relating to registration in cities with 25,000 and less than 100,000 inhabitants, and enacting in lieu thereof a new section relating to the same subject-matter, to be known as Section 5089."

"We have often held that the foregoing constitutional provision in regard to titles of legislative enactments should be wisely and liberally construed so as to not thwart the efficiency of salutary legislation. The nature of the constitutional provision being thus understood, unless the title to the act fails to clearly indicate the legislative will, it has met with our approval. (Cocoa Cola Bottling Co. v. Mosby, 289 Mo. l.c. 472 and cases; Booth v. Scott, 205 S.W. (Mo.) 633.)

With this end in view we have frequently held that a numerical reference to the section sought to be amended without a statement of the subject-matter of the amendatory act is a sufficient title to an act which deals exclusively with the subject of the section to be amended. (State v. Mullinix, 301 Mo. l.c. 390 and cases.) We therefore hold the title to be sufficient."

The case of Stephens v. Gorman, 266 Mo. 206, is an interesting case dealing with the claim that the State Capitol Commission Board that built the present capitol building had authority to spend \$500,000 of the \$3,500,000 bond issue for furnishing the equipment for the capitol building. They there sought to support the plaintiff's claim by reference to the title, but the court held they could not do that because the body of the bill was plain and unambiguous. At l.c. 216 the court said:

" * * * * There is no ambiguity in the act of March 24, 1911, as already pointed out, and resort to the title is therefore not justified by the rule.
* * * *"

In State v. Cox, 234 Mo. 605, in passing upon the sufficiency of the title to the bill under attack, the court held at l.c. 608:

"It is true the title to the primary election law does not recite that penalties are prescribed for the violation of its provisions. It is not necessary that the title of said act should refer to such penalties. The creation of penalties for violation of a law is but an incident or detail of the law, and need not be referred to in its title."

In the case of Ex parte Hutchens, 296 Mo. 331, the court, en banc, sustained the validity of a title which designated the sections amended by simply referring to their numbers in statutes, and said at l.c. 336:

"The contention as to the invalidity of the title of the act under review demands consideration; it is urged first that it is defective in designating the sections amended simply by referring to their numbers in the authorized edition of the statutes. A liberal construction of the constitutional provision (Sec. 28, Art. IV) is authorized; regard being had to the purpose of the provision which is to prevent members of the General Assembly from being misled as to the character of the legislation. Acting under the rule thus construed, we have held that amendments to sections of the Revised Statutes may be made by acts whose titles refer only to those sections by numbers. (Asel v. City of Jefferson, 287 Mo. 195, and cases p. 205.)"

Again, at l.c. 338, the court said:

"A failure of the title to refer to the penalty prescribed in the body of the act is urged as error. This court has on several occasions ruled adversely to this contention. If the title of an act is a fair index of same, which we hold it to be in this case, matters not specified therein necessary to render it effective, such as the punishment in a criminal statute, will not render it invalid. (State v. Cox, 234 Mo. l.c. 609; State v. Peyton, 234 Mo. l.c. 524.)"

Conclusion.

From the above decisions construing the question here considered, it will be observed that the courts give a liberal construction to the section of the Constitution dealing with the title to a bill, and hold the title to be a compliance with the constitutional requirement when the title includes the main points of the bill and does not mix up a number of

different subjects in the same bill. It is not necessary that the title should include within it all of the details, nor even, as is held above, the penalty prescribed by the bill. While we regard it as better practice for those interested in a bill that carries an emergency clause to amend the title or to see that the title contains the words "with an emergency clause," and the same may easily be done without loss of time or effort and thereby all question be eliminated as to that phase of the validity of the bill, still we regard the title as sufficient where it does not specify that it has an emergency clause, and the bill becomes effective at the time it is finally passed.

Yours very truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml

CONSTITUTIONAL LAW:
COUNTY COURT: ROADS
AND BRIDGES: TAXES:

The County Court, in its discretion, may levy a county road and bridge tax under the provision of House Bill No. 784 and, when a petition has been circulated and a road district within the county has voted an additional tax, the county court may levy said additional tax in the district or districts in which voted.

August 9, 1946

FILED
18

Mr. F. P. Wingate
County Clerk
Paris, Missouri

Dear Mr. Wingate:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department upon the following question: To what extent does the county court have the authority to levy taxes for road purposes?

Section 12(a), Article X of the Constitution reads:

"Sec. 12(a). Additional Tax Rates for County Roads and Bridges--Road Districts.-- In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and

placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

House Bill No. 784, passed by the 63rd General Assembly and approved by the Governor on April 10, 1946, repealed the sections of the statute relating to taxes for road and bridge purposes in the counties of the state. In lieu of these taxes House Bill No. 784 enacted sections complying with Section 12(a) of Article X of the new Constitution.

Section 8527 of House Bill No. 784 reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifth of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county

leading through such city or village."

The additional levy which may be made in the road districts of any county under the provisions of Section 12(a) of Article X of the Constitution is provided for in Section 8529 of House Bill 784 which reads as follows:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of Section 12 of Article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing such petition. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters.

The above constitutional and statutory provisions show that the county court, in its discretion, may levy a tax for road and bridge purposes, in addition to the other taxes which it may lawfully levy for the carrying on of the functions of the county. This road and bridge tax is not to exceed thirty-five cents for each one hundred dollars assessed valuation on property in the county. In addition to this general levy, which is made by the county court, another levy may be made in any general or special road district in the county. This levy must not exceed thirty-five cents on the one hundred dollars assessed valuation on all taxable real and tangible personal property in said road district. The county court may not levy this additional tax until the provisions of Sections 8529 and 8530 of House Bill No. 784 have been complied with. This section requires that a petition must be circulated in the road district

asking that the county court call an election in such district for the purpose of voting for or against the additional levy which is restricted to the particular road district. If the election is properly held and the proposition is approved the county court may then make the levy in said district.

In summary, the county court is authorized to levy a road and bridge tax under Section 8527 of House Bill No. 784 of the Constitution of Missouri up to thirty-five cents on each one hundred dollars assessed valuation of property in the county. In addition to this, the county court may levy a road and bridge tax up to thirty-five cents on the one hundred dollars assessed valuation in any or all general or special road districts if the district or districts in which the additional levy is made has voted such additional levy and the proceedings have complied with Sections 8529, 8530 and 8531 of House Bill No. 784.

We herewith enclose a copy of House Bill No. 784 for your convenience.

CONCLUSION

We are, therefore, of the opinion that the county court may, in its discretion, levy a road and bridge tax up to but not exceeding thirty-five cents on the one hundred dollars assessed valuation of property in the county and that an additional thirty-five cent levy on each one hundred dollars assessed valuation may be made in the general or special road district or districts which petition for, and by their vote approve of the same, under the provisions of House Bill No. 784 as passed by the 63rd General Assembly and approved by the Governor on April 10, 1946.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

SMITH N. CROWE, JR.
Assistant Attorney General

SNC:mw
enc.

SAVINGS AND LOAN ASSOCIATIONS: Savings and Loan Association may mortgage, pledge or hypothecate assets as part of its power to borrow under Section 60 of House Bill 481.

April 30, 1943



Mr. J. C. Woodsmall
Chief Examiner
Division of Savings and Loan Supervision
State Office Building
Jefferson City, Missouri

Dear Mr. Woodsmall:

We hereby acknowledge receipt of your request for an opinion, which reads as follows:

"Since there is a question in the minds even of attorneys regarding the matter below quoted, we, as mere laymen, hesitate to venture our suggestion and, therefore, request your opinion.

"The borrowing institution is not a member of the Federal Home Loan Bank. While under House Bill No. 481 and the by-laws, the association has the power to borrow money from institutions other than the Federal Home Loan Bank, we did not find any express provision in either the by-laws or the House Bill involved permitting the mortgaging, pledging or hypothecation of assets to secure the money so borrowed. While from a reading of the by-laws and the Bill as a whole there is no doubt in our minds but what the right to borrow would imply the right to mortgage, pledge or hypothecate assets as security therefor, nevertheless, as a precautionary measure for the benefit of our client, we would very much appreciate an expression from you as to the right of an association to borrow within the limits as afforded under

House Bill No. 481 from an institution other than the Federal Home Loan Bank, and to mortgage, pledge or hypothecate, as the case may be, its assets as security therefor."

The applicable part of House Bill 481 is Section 60, wherein it is provided:

"Any association shall have power to borrow (a) if it is not a member of a Federal Home Loan Bank, not more than an aggregate amount equal to twenty-five per cent or (b) if it is a member of the Federal Home Loan Bank, not more than fifty per cent of its capital on date of application, or any date not more than thirty days prior thereto; provided that total borrowing from sources other than the Federal Home Loan Bank, if the association is a member of the bank, shall not exceed ten per cent of its capital."

Under this section, an association which is not a member of the Federal Home Loan Bank may not borrow more than an aggregate amount equal to twenty-five per cent of its capital on the date of application, or any date not more than thirty days prior thereto.

As to whether the association may mortgage, pledge, or hypothecate its assets as security therefor, we quote from the case of *Boerheide v. Johnston*, 81 Mo. App. 193, wherein it is held, 1. c. 199:

"This question has received thorough consideration of the courts in several states of this union as well as of England and from these adjudications we deduce the following conclusions: Prima facie there is nothing in the character of these associations which takes them out of the general rule which permits corporations generally to borrow money to carry out the purposes of their incorporation though such power is not expressly conferred

by the law creating them. 4 Am. and Eng. Ency. of Law (2 Ed.), p. 1022 and 1023; Andrieux on Bldg. Ass'ns (2 Ed.), secs. 297-299; Thomp. on Bldg. Ass'ns (2 Ed.), secs. 297-299; Thomp. on Bldg. Ass'ns, sec. 277, and cases cited; Davis v. West Saratoga Bldg. Union, 32 Md. 285; Jackson v. Meyers, 45 Md. 452; Bldg. Ass'n v. Bank, 79 Wis. 51; Jones v. Bldg. Ass'n, 94 Pa. St. 215; Mohenshell v. Sav. & Loan Ass'n, 140 Mo. 566; Bailey v. Ins. Co., 73 Mo. 381 et seq.

"At first this power to borrow was denied in England but such power could be conferred by a rule to that effect in the charter, so held by the House of Lords. Murray v. Scott, L. R. 9 App. Cas. 538.

"In many states of the Union this power is expressly conferred by statute. In Missouri the statutes did not grant this power expressly prior to the act of April 20, 1895 (Laws of Mo., p. 114, sec. 17) which confers the power to borrow but limits it to temporary purposes not inconsistent with the objects of the organization and provides it shall have no longer duration than two years, and not to exceed at any one time the aggregate amount of the income from dues and interest for six months.

"That act of course does not affect this case.

"Our conclusion is that the power to borrow money for the purposes of its business was implied in building associations at the time this institution received its right to do business, that as a corollary to that power it might execute its note or obligation to the lender and assign the notes or bonds it held to secure lenders to it, and in case of its

insolvency it could lawfully assign all of its notes and other assets to its assignee selected by its board of directors to collect and distribute its assets to its creditors and stockholders. *Detweiler v. Breckenkamp*, 85 Mo. 45; *Callahan's Appeal*, 124 Pa. Ct. 136." (Underscoring ours.)

It is a well established principle of law that a building and loan association may exercise only such powers as are conferred upon it by the legislative body creating it, either by express terms or by necessary implication. 12 C.J.S. 456; 9 Am. Jur. 130.

Conclusion

It is the opinion of this department that under Section 60 of House Bill 481, building and loan associations are given the power to borrow money subject to the limitations specified therein, and incidental to that power to borrow is the power to mortgage, pledge or otherwise hypothecate their assets as security therefor.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. A. TAYLOR
Attorney General

JMA:EG